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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. ~~1965~~ 197

MISSISSIPPI POWER COMPANY and MISSISSIPPI POWER & LIGHT COMPANY, *Petitioners,*

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

JAMES S. EATON
EATON, COTTRELL, GALLOWAY & LANG
2300 Fourteenth Street
Gulfport, Mississippi

THOMAS H. WATKINS
WATKINS AND EAGER
800 Plaza Building
Jackson, Mississippi
Attorneys for Mississippi Power Company.

SHERWOOD W. WISE
WISE, SMITH AND CARTER
918 Electric Building
Jackson, Mississippi
Attorneys for Mississippi Power & Light Company.

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No.

MISSISSIPPI POWER COMPANY and MISSISSIPPI POWER & LIGHT COMPANY, *Petitioners,*

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, *Respondent*

NO. 43,693 IN THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

I: Introductory

Come now Mississippi Power Company and Mississippi Power & Light Company, Petitioners, and pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi made and entered in the above entitled cause on February 14, 1966, and the order of the Supreme Court of the State of Mississippi denying suggestions of error (equivalent in Mississippi to petitions for rehearing), entered on March 21, 1966, wherein the Supreme Court of Mississippi affirmed the action of the Mississippi Public Service Commission

in granting to the Respondent a certificate of public convenience and necessity under the provision of Chapter 372, Laws of Mississippi of 1956, for the construction and operation of a steam electric generating plant and transmission system to be located in the State of Mississippi.

II. Opinions and Judgments Rendered Below

Copies of the opinion and judgment of the Supreme Court of Mississippi rendered on February 14, 1966 (unofficially reported in 183 So. 2d 163) are appended hereto as Appendices Nos. 1 and 2.

A copy of the order of the Public Service Commission dated March 8, 1963 is appended hereto as Appendix No. 3.

Copies of the opinion and judgment of the Chancery Court of Hinds County, Mississippi, First Judicial District (an intermediate Appellate Court in matters appealed from the Public Service Commission), dated January 22, 1965, are appended hereto as Appendices Nos. 4 and 5.

III. Grounds on Which Jurisdiction of This Court Is Invoked

A. The judgment sought to be reviewed was rendered by the Supreme Court of Mississippi on February 14, 1966. Such judgment affirmed an order of the Mississippi Public Service Commission dated March 7, 1963.

B. Suggestion of Error (Petition for Rehearing in Mississippi) was overruled by the Supreme Court of Mississippi on March 21, 1966.

C. Jurisdiction is believed to be conferred on this Court by Title 28, U.S.C.A., Section 1257 (3).

IV. Questions Presented for Review

A. Whether Chapter 372, Laws of Mississippi of 1956, as construed and applied by the decisions below, deprives Petitioners of their property incident to certificates of con-

venience and necessity held by them, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

B. Whether Chapter 372, Laws of Mississippi of 1956, and Section 9700, Mississippi Code of 1942, Recompiled (as amended), as construed and applied by the decisions below, deny to Petitioners the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, by virtue of the tax exemptions granted to Respondent pursuant to said Section 9700.

C. Whether the State of Mississippi, in construing and applying Chapter 372, Laws of Mississippi of 1956, in accordance with the decisions below, has created an undue burden upon, and unconstitutional impairment of, interstate commerce in that the actions herein sought to be reviewed would deprive Petitioners of their sales of electric energy moving in interstate commerce, and would give preference to intrastate facilities proposed to be constructed by Respondent.

D. Whether Chapter 372, Laws of Mississippi of 1956, as construed and applied by the decisions below, violate Title 7, U.S.C.A., Sec. 904, in that the proceeds of the Rural Electrification Administration loan, with the proceeds of which Respondent would construct said facilities, would be used to render electric service to persons already receiving central station service.

V. Constitutional Provisions and Statutes Involved

A. Amendment XIV, Sec. 1, of the Constitution of the United States is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. The Interstate Commerce clause of the Constitution of the United States (Art. I, Sec. VIII, 3) is as follows:

"Section 8, Clause 3. Regulation of commerce.

"The Congress shall have power . . . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

C. Chapter 372, Laws of Mississippi of 1956 (appearing as Sections 7716-01 through 7716-38, inclusive, of the Mississippi Code of 1942, Recompiled), and particularly Sections 7716-01, 7716-04, 7716-05, 7716-26 thereof. Because of the length of the statute, it is set forth as Appendix No. 6 hereto.

D. Sec. 9700, Mississippi Code of 1942, Recompiled, as follows:

"9700. Nonprofit cooperative electric power associations.

"(1) The property of all nonprofit cooperative associations organized heretofore or which may be hereafter organized under any of the laws of this state for the purpose of selling, transmitting, distributing or generating electricity, electric current or power and which shall engage in any such business or businesses, shall be exempt from ad valorem taxes, and such association shall be exempt from franchise, privilege, net income or other excise taxes, imposed by the State or any of its political subdivisions. Provided, however, that this exemption shall not extend to or include exemp-

tions from payment of gas taxes, motor vehicle privilege tax, and sales taxes levied upon sales by Chapter 119, Laws of 1934 (§§ 10103 et seq.), as amended or hereafter amended.

"(2) This exemption shall apply to all property which may be used or useful in the transaction of any such business or businesses, including but not limited to office buildings, warehouses, office equipment and supplies, maintenance, operating and construction equipment, supplies and materials, and all electrical distribution and transmission lines and component parts thereof. Provided, however, that nothing contained in the act shall be construed so as to grant exemption from municipal ad valorem taxes on any real estate owned by such associations.

"(3) In the event any such association shall engage in the sale of commodities, goods, wares, or merchandise as a business, the foregoing exemptions shall not apply to that part of the business so done.

"(4) In the event any part of any office building owned by such an association shall be rented or subrented by any such association, such building shall not be exempt from ad valorem taxes, but may be assessed by the county tax assessor and board of supervisors of the county in which it is situated and by the taxing authorities of any municipality in which it may be situated."

E. Sec. 9825, Mississippi Code of 1942, Recompiled, as follows:

"9825. State tax commission assessors of public service corporations.

"The members of the state tax commission are constituted state assessors of railroads and other public

service corporations, and they shall, upon the receipt or making of the schedules hereinafter provided for, assess the property of railroads, telegraph, telephone, sleeping car, express, electric power and light companies and other public service corporations liable to taxation in the state, affixing its true value so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise and the capital engaged in the business in this state; and the state assessors of railroads and other public service corporations may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the value of the franchise and amount of capital engaged in the business in this state."

F. Title 7, U.S.C.A., Sec. 904 (set forth as Appendix No. 7).

VI. Statement of the Case

The litigation was initiated by the filing by Respondent of a petition with the Public Service Commission of the State of Mississippi for a certificate of convenience and necessity for the construction by Respondent of a steam electric generating plant and transmission system in the southeastern portion of Mississippi which would be used for the furnishing of electric service for resale to four distributing REA financed cooperatives, and to replace an electric service presently being rendered by Petitioners to such cooperatives for their redistribution.

The Petitioners are investor-owned electric utilities engaged in the generation, transmission and distribution of electric power, the Petitioner Mississippi Power & Light Company operating in an area comprising approximately

the west half of Mississippi, and the Petitioner Mississippi Power Company operating in an area comprising approximately the southeastern quarter of Mississippi.

The Petitioners filed with the Public Service Commission their answers, protests and objections to the application of Respondent for a certificate, which protests and objections are found in Volume 8, Pages 669 et seq., and Volume 11, Pages 1167 et seq. of the record. In those answers the Petitioners specifically alleged that they were rendering to the distributing cooperatives electric service pursuant to Grandfather and other certificates of convenience and necessity issued by the Public Service Commission, and that these services would be discontinued and replaced by the project requested by the Respondent; that thereby the property rights of Petitioners incident to those certificates would be denied and abridged without due process of law and in contravention of the Fourteenth Amendment to the Constitution of the United States. Such answers also alleged that each of the Petitioners is in a larger electrical system operating in several states, the Petitioner *Mississippi Power & Light Company* being a part of the Middle South System (operating in Arkansas, Louisiana and Mississippi), and the Petitioner *Mississippi Power Company* being a part of the Southern Company System (operating in Georgia, Alabama, Florida and Mississippi). The electric energy presently supplied by Petitioners to the distributing cooperatives is in substantial part electric energy being transmitted in interstate commerce. The answers also alleged the tax exempt status of the facilities proposed to be constructed and of the Respondent as contrasted to the liability of Petitioners for full taxation on their facilities and operations. The answers also allege that the proposed loan of funds by the Rural Electrification Administration to Respondent was violative of Title 7, U.S.C.A.,

Sec. 904, and of the loan agreement (Exhibit 9, Vol. 16, p. 1848) in that the project would not provide service to those not then receiving central station service. In addition to these grounds of objection, the Petitioners asserted numerous grounds upon which it denied that public convenience and necessity existed for the construction of the proposed system of Respondent.

There was involved initially in the case a request of the Respondent for a "Grandfather" certificate under Section 5B of Chapter 372, Laws of Mississippi of 1956 (herein called the Utility Act), pertinent portions of which appear as an Appendix hereto. The Commission issued orders granting to the Respondent both a Grandfather certificate and a certificate based on a finding of public convenience and necessity. The Petitioners appealed to the Chancery Court, First Judicial District of Hinds County, Mississippi, in the manner provided by the Utility Act, Section 26, also appearing as an appendix hereto. The Chancery Court of Hinds County on January 22, 1965, issued its opinion and judgment whereby it reversed the action of the Commission in granting Respondent a Grandfather certificate, but affirmed the action of the Commission whereby Respondent was granted a certificate based on public convenience and necessity. Respondent did not appeal from the action of the Chancery Court with regard to its decision on the Grandfather certificate, and this feature of the case has disappeared.

The Petitioners thereupon appealed from the decision of the Chancery Court affirming the Commission's action in granting a certificate based on convenience and necessity to the Supreme Court of Mississippi. While the appeal was thus pending in the Supreme Court of Mississippi, in July, 1965, the Respondent filed with the Public Service Commission a Petition To Amend the certificate granted by the Commission so as to request authority to con-

struct a plant approximately three times the size of that previously authorized, and to construct a transmission system considerably larger and, in some respects, of higher voltage than that initially authorized. The Respondent asserted in its petition to the Commission that it was not economically feasible to construct the plant which was initially authorized. The Petitioners then filed in the Supreme Court of Mississippi a Plea in Bar asserting that by virtue of the Respondent's Petition to Amend the certificate then under review, the cause had thereupon became moot, and that the Supreme Court of Mississippi should vacate the order of the Commission, reverse the case and remand it back to the Commission for rehearing on the revised project.

On February 14, 1966, the Supreme Court of Mississippi rendered its decision and judgment denying the Plea in Bar and affirming the action of the Commission in granting the certificate therein. On March 21, 1966, the Supreme Court of Mississippi overruled the Suggestions of Error filed by Petitioners (in Mississippi a suggestion of error is the equivalent of a petition for rehearing).

The Supreme Court of Mississippi, in affirming the action of the Public Service Commission, decided the questions presented for review adversely to Petitioners. In the course of the hearings before the Commission the following facts, undisputed, were established which bear upon the questions involved in this petition for writ of certiorari:

(a) The certificates relied upon by Petitioners appear in Vol. 59, pp. 8784 et seq., 8804 et seq.; 8890 et seq.; in Vols. 49-50, pp. 7272-7304. The grandfather certificate of Petitioner Mississippi Power Company, although not issued at the time of the hearings before the Commission, was before the Supreme Court upon

its consideration of the case, and was referred to and quoted from by the Court. Such certificate, without irrelevant geographical descriptions, is Appendix 8 hereto.

(b) The interstate character of the systems of Petitioners is shown by maps thereof at Vol. 49, p. 7217 and Vol. 59, p. 8742.

(c) The exemption of Respondent from taxation is shown by Exhibits 253, Vol. 45, p. 6447, and by testimony of the witness Treadway, Vol. 45, pp. 6539-40, wherein he, an expert for Respondent, stated that taxes formed no part of an economic study of Respondent's projected operations because they "were not applicable". The impact of taxes on Petitioners is shown in Vol. 49, p. 7232 and Vol. 59, p. 8747.

(d) The testimony of the witness Dudley, Manager of Respondent, that no persons not already being served would be served by the proposed project is in Vol. 80, p. 12,208. The requirements of the loan agreement between R.E.A. and Respondent, requiring the proceeds of the loan to be used for rendering service to persons not already receiving central station service, are found in Vol. 16, p. 1848.

VII. Reasons Why Writ of Certiorari Should Be Granted

A. *Denial of due process*

A. Mississippi had no statewide regulation of electric utilities prior to the Public Utility Act adopted March 29, 1956. In that Act it was provided that "Grandfather" certificates should be issued upon seasonable application therefor without further proof "for the construction or operation then being conducted." The Petitioners were rendering to the distributing cooperatives all of their elec-

tric service requirement for their redistribution to their member consumers. These cooperatives are organized under state law as non-profit organizations, and as such have been granted by legislative action exemption from ad valorem, income, franchise, and other taxes, with relatively few minor exceptions.

The Petitioners have received, pursuant to Section 5(b) of the Utility Act, "Grandfather" certificates of convenience and necessity providing for, among other things, the rendering of such electric service to the distributing cooperatives. It is this service which would be replaced by the facilities authorized in the Respondent's certificate, and the effect thereof would be to cancel the certificate of the Petitioners for that service.

Certificates granted pursuant to the State Utility Act have been construed by the State Supreme Court to constitute franchises from the State and to confer valuable rights in the holders thereof. In *Capital Electric Power Assn.* vs. *Mississippi Power & Light Co.*, 240 Miss. 138; 125 So. 2d 739, 743, the Mississippi Court said,

> "Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State."

Certificates issued under the Act have been held by the Court previously to be exclusive, subject only to a showing of inadequacy of service being rendered by the holder thereof. In *Mississippi Power Co.* vs. *East Mississippi Electric Power Assn.*, 244 Miss. 40; 140 So. 2d 286, 288, the Court said:

> "The question as to whether the right of East Mississippi in said areas is exclusive depends, under the act and decisions of this Court, upon whether East Mississippi renders adequate service. Sec. 7716-05(f), Code of 1942; *Capital Electric Power Association* v. *Mississippi Power & Light Company,* 240 Miss. 139, 125 So. 2d 739."

Subsequently the question was presented as to whether a municipal franchise, granted prior to the passage of the Utility Act for a twenty-five year period which had not then expired, took precedence over a certificate issued under the Utility Act insofar as it related to territory annexed to a municipality after the passage of the Act. In the case of *Delta Electric Power Assn.* vs. *Mississippi Power & Light Co.,* 149 So. 2d 504, 250 Miss. 482, the Mississippi Supreme Court held that the certificate under the Utility Act, although issued subsequent to the municipal franchise and during the twenty-five year franchise period, prevailed over the municipal franchise. Certiorari to review that decision was denied in this Court. 375 U.S. 77; 11 Law Ed. 2d 142. In this decision the Mississippi Supreme Court, in construing the nature of a certificate said:

> "Prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of grandfather certificates under Section 5 are made on an area rather than a facility basis; (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts."

* * * * * * *

> "In short, prior decisions under the Public Utility Act of 1956 hold that certificates to public utilities are based on an area basis, are valuable rights, although nonexclusive, entitled to protection of the courts and the Commission (under Section 4) has 'exclusive original jurisdiction over the intra-state business and property of public utilities.' "

The court also in this case decided that one of the property rights incident to a certificate granted under the Act was the right to have that certificate remain in force and effect until cancelled only in the manner provided by the Act. The court said the following:

> "Nor is there any direction that a municipal expansion shall cancel or in any way affect a Commission certificate. *The exclusive method for cancellation of such a certificate is prescribed in subsection (f), Section 5, where a utility is not rendering reasonably adequate service, and fails to do so after ordered to correct it.* Yet Company's argument would add an additional ground for cancellation of a Commission certificate, namely, where a municipality has extended its corporate limits into a previously certificated area. The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods. 50 Am. Jur., Statutes, Secs. 244-46; *Tepper Bros.* v. *Buttross,* 178 Miss. 659, 664, 174 So. 556 (1937)." (Emphasis ours)

Thus one of the primary rights conferred by the statute and certificates issued thereunder is the right to enjoy the benefits of such certificate until it has been cancelled in the manner provided by the Act itself. Furthermore, the Court found that the statutory method prescribed for the

cancellation of a certificate is the only method by which it can be rendered inoperative. The State Supreme Court again reaffirmed the decision in Delta by its decision in *Capital Electric Power Assn.* vs. *Miss. Power & Light Co.*, 150 So. 2d 534; 250 Miss. 514.

It is reflected in the record in this case that after the issuance to the Petitioners of the grandfather certificates providing for the rendering of service to the Respondents, the Petitioners have expended, in reliance upon such certificates, large sums of money in the construction of generation and transmission facilities, by means of which the Petitioners continue to render service to the distributing Co-operatives. In the decision, however, to which this petition is directed, the Court has held that the Act permits the cancellation of a certificate without a showing that the service being rendered thereunder is inadequate or unsatisfactory. Despite the Court's statement that "in candor we should state that the Commission has not found the services of either of the Protestants to be inadequate," it went on to say that "the so-called franchise doctrine, referred to in the Elton case for example, does not apply to the issuance of a certificate of convenience and necessity for a wholesale electric transmission line." The Court recognized that there was involved in this construction of the Utility Act a serious constitutional question of due process for it said further,

> "Protestants urge that since the petitioner did not directly follow the statutory remedy for inadequacy, that, in effect, the petition under Section 7716-05(c) (certificate of public convenience and necessity) is a collateral attack upon their valuable franchise rights and they are deprived of due process thereby. We are of the opinion this contention is not well taken as the statute refers to a specific service area and not to a

facility (delivery point) as here, and there is no finding that the protestants are not rendering 'reasonably adequate service', and by the plain terms of the statute the remedial provisions thereof are not applicable until there be such finding. We conclude that this assignment of error is not well taken and that the protestants' constitutional rights were not violated by the order of the commission in this proceeding."

If the Utility Act thus authorizes the Commission to cancel an outstanding certificate and the property rights incident thereto in the manner in which it was done in this proceeding below, then there is a deprivation of the Petitioners' property rights incident to their own certificates without due process of law. Due process of law would have required that such property rights could not be cancelled or divested unless and until it had been shown that the Petitioners were not rendering satisfactory or adequate public service thereunder. The property rights of Petitioners had already vested and the only constitutional method by which such rights can subsequently be divested are cancelled by a proceeding under the Act directly attacking such rights on the ground of inadequacy of service. The Court below admitted that this was not done and thereby Petitioners say that they have been denied due process.

A utility franchise is a property right and entitled to the protection of the Constitution of the United States and it is also a property right which can be extinguished only in accordance with the procedures set forth in the Act which created such right. *Owensboro* v. *Cumberland Telephone and Telegraph Co.*, 230 U.S. 58; 57 Law Ed. 1389; *Detroit* v. *Detroit Citizens Street Railway Co.*, 184 U.S. 368; 46 Law Ed. 592; *Boise Artesian Hot and Cold Water Co.* v. *Boise City*, 230 U.S. 84; 57 Law Ed. 1400.

The sole statutory method by which the property right incident to the certificate of Petitioners could be extinguished or cancelled, that is by the statutory showing of inadequacy of service thereunder, is an incident to and an attribute of the property right itself. The cancellation of such right in a proceeding in which the adequacy of service was neither challenged nor found to be inadequate, is therefore a taking of such property right of the Petitioners without due process of law.

B. *Denial of equal protection*

B. Certiorari should be granted in this cause by reason that the Respondent has been given such preferred treatment by the State of Mississippi through tax exemptions as set forth in Section 9700 (attached as an appendix) as to deny to the Petitioners, who are fully taxed and tax-paying investor-owned utilities, the equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States. The project proposed to be constructed by the Respondent and for which the State of Mississippi has granted both its exemption and certificate authority, will be used to replace electric service presently being rendered by Petitioners. Since the State of Mississippi subjects the Petitioners to full taxes, ad valorem, income, franchise, and other excise taxes, and exempts the Respondent from similar taxes although Respondent is engaged in precisely the same operation, such treatment obviously constitutes a denial to the Petitioners of the equal protection of the laws of the state.

While states may be afforded considerable latitude in classifying property for the purpose of conferring thereon tax exemptions, such latitude does not permit discriminatory practices through the device of tax exemption. "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and sub-

stantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* vs. *Virginia,* 252 U.S. 412; 64 Law Ed. 989, 990. In *Hillsborough Township* v. *Cromwell,* 326 U.S. 629; 90 Law Ed. 358, 363, the Court said:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

The objective of promoting the use and development of electric service in rural areas, which, for the sake of argument, may be said to support the exemption conferred by Section 9700 as to distributing cooperatives, bears no reasonable relation to the exemption by virtue of that statute of the Respondent, whose only objective is to enter the generation and transmission field replacing existing service rendered by the Petitioners, whose property and operations are subjected to full taxation. Use of the economic benefits resulting from tax exemption as a basis for justifying the issuance of a certificate under the Utility Act to Respondent, therefore, denies to the Petitioners equal protection under the Fourteenth Amendment when the certificate thus issued to Respondent is to be used as a means for depriving Petitioners of the use and enjoyment of their property which is fully subject to tax.

The Petitioners are aware of the following statement made in *Puget Sound Power and Light Co.* vs. *Seattle,* 291 U.S. 619, 625; 78 Law Ed. 1025, 1030:

> "It could not plausibly be argued that a private non-profit corporation distributing electric current to consumers at cost could not be exempted from taxes borne by others serving the same wants."

It should be noted that the above quoted statement was, insofar as the decision of the particular case was concerned, dictum. Furthermore, there was involved in that case the matter of an electric operation owned and operated by a municipality, not by another corporation privately chartered and financed with the loan of public funds. Finally it might be noted that the Puget Sound case was decided before the Hillsborough case. If the meaning of the dictum in Puget Sound is contrary to the contentions being urged here by the Petitioners, then in the light of the principles announced in Hillsborough, the use of tax exemption to support the action in the cause now under review should be re-examined in the light of discrimination and denial of equal protection to the Petitioners under the Fourteenth Amendment.

C. *Impairment of interstate commerce*

C. Certiorari should be granted in this cause because the effect of the decision of the Supreme Court is to impede, impair and create an unlawful burden upon interstate commerce, in violation of Article I, Section VIII, 3, of the Constitution of the United States. The Petitioners are serving the electric requirements of the distributing cooperatives by means of electric systems which are themselves components of integrated multistate operations. The Middle South System, of which *Mississippi Power & Light Company* is a member, and the Southern Company System, of

which *Mississippi Power Company* is a member, are themselves connected with each other and connected to neighboring and adjacent systems. In the operation of the systems electric power generated at any point on the system may and does flow over the transmission lines of all the members thereof in state boundaries in both directions. The rates and charges of the Petitioners to the distributing cooperatives are subject to the jurisdiction of the Federal Power Commission under the Federal Power Act, and such rates and charges are filed with that Commission. The jurisdiction of the Federal Power Commission exists because the sales constitute sales of electric energy in interstate commerce for resale.

In the instant case the Supreme Court, while admitting that services rendered by Petitioners were adequate, nevertheless said that the proposed project of Respondent was justified because "there was a need for additional generating capacity broad enough to encompass the 65 MG generating facilities authorized." Here the Court was failing to quote accurately what the Commission did find. What the Commission found was that there was a need for additional generating capacity *within Mississippi.* (See paragraph 12 of Appendix No. 3 p. 48 herein). The Commission recognized that there was ample capacity in the interstate systems of which the Petitioners are a part to supply all of the requirements of the distributing cooperatives now and in the future. Thereby the State of Mississippi through the Commission and through its Supreme Court is saying that it will deny to Petitioners the right to use facilities in interstate commerce to sell electric energy passing in interstate commerce in favor of one who proposes to construct an intrastate facility in lieu thereof. If this is the state adopted criteria by which the rights of those who propose to enter the electric generation field are measured, then such policy necessarily imposes an undue burden upon

interstate commerce because such facilities will be used to replace energy moving in interstate commerce. If such be the policy of the state, as it seems to be, then such power could well be invoked by the state to deny to TVA its right to supply the electric requirements in the northeastern part of Mississippi with power, none of which is generated in Mississippi, and all of which is moved in interstate commerce. It is, therefore, the position of Petitioners that the action of the Commission and the Court is in contravention of interstate commerce clause, and thereby poses a substantial federal question which should be reviewed by this Court.

State action cannot be invoked to prohibit or to cancel the movement of goods and services in interstate commerce. *Buck* vs. *Kuykendall,* 267 U.S. 307; 69 Law Ed. 623; *Bush* vs. *Maloy,* 267 U.S. 317; 69 Law Ed. 627. In Bush it was said "Its (the action of the State of Washington in requiring a certificate for use of an interstate highway) effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause."

In *Chicago* vs. *Atchison, Topeka and Santa Fe Railroad Co.,* 357 U.S. 77; 2 Law Ed. 2d 1174; it was held that the City of Chicago had no constitutional right to require a certificate from a corporation organized at the request of interstate railroads for the purpose of transporting passengers between railroad stations within the City of Chicago, because such action would constitute an unlawful burden upon interstate commerce. Here the State of Mississippi has said that only the Respondent can render service to the distributing Cooperatives since it is proposing to construct generating facilities within the State of Mississippi. The effect of this judgment is therefore to deny to the Petitioners the use of facilities presently engaged in interstate sales from continuing to be utilized for such purpose. The state action is, therefore, just as much a

burden upon interstate commerce, and obstructive of it, as was the action of Chicago in attempting to regulate the interstate transmission of passengers between railroad stations in the City of Chicago.

D. *Violation of 7 U.S. Gode Annotated, Section 904*

D. Certiorari should be granted in this case because the project, financed as it is proposed to be, would be violative of 7 U.S.C.A., Section 904, which is Appendix No. 7 hereto.

It is undisputed that the Respondent's project, if constructed, would not serve any person with electric energy who is not already receiving it from central station services. See Record, Vol. 80, Page 12,208. Since the project would not serve anyone who is not already served, it is apparent that the Rural Electrification Administration would be lending funds in violation of the above statute, which restricts the making of such loans for the purpose of providing electric service to those not receiving central station service. Furthermore, the loan agreement between the Respondent and the Rural Electrification Administration contains this same limitation. Record, Vol. 16, Page 1848. Since, therefore, the financing of this project would necessarily involve a violation of federal law, there is presented upon this ground a substantial federal question which should be reviewed by this Court.

The record in this cause demonstrates that the Petitioners have, in reliance upon the certificate rights vested in them, invested substantial sums in facilities devoted to the rendering of service to the distributing cooperatives. Petitioners, by virtue of their property rights incident to their own certificates, therefore have sufficient proprietary interest to satisfy the requirement of a justiciable interest in litigating the lawfulness of the use of federal funds under the quoted statute for construction of Respondent's

project. The principle has been well stated in the very recent case of *Puente de Reynosa, S.A.* vs. *City of McAllen,* 357 F. 2d 43 (1966) wherein the court said:

> "Stated broadly, standing to litigate a 'case or controversy' depends on whether the plaintiff's interest, economic or civil, or the public's interest is sufficiently important to justify judicial determination of the controversy. In the case before the Court a federal statute directly affects both substantial economic interests of the litigants and the convenience of the public. In these circumstances we think that the plaintiff has sufficient standing to bring this suit."

* * * * * * *

> "To find justiciable interest in the international bridge situation, we look beyond the franchise rights expressly granted by statute. Franchise rights, broadly speaking, may involve private property rights or a public interest deemed worthy of protection. See Annot., 90 ALR 2d 12-13 (1963). Here the plaintiff claims that its annual profits from the old bridge have been at least $15,000 a year; if the new bridge is completed and put into operation, there will be a sharp reduction in these revenues, with perhaps even a termination of the old facility. A substantial part of the value of its Mexican concession, so the plaintiff's argument goes, would be destroyed by illegal acts of the defendant. In this situation Puente de Reynosa has made a sufficient showing of proprietary interest in the continued operation of the old bridge to satisfy the requirement of a justiciable interest in litigating the necessity of congressional consent to a new bridge."

WHEREFORE, Petitioners respectfully submit that this Court should issue a writ of certiorari in this cause; that the federal questions involved are substantial; and that upon review by this Court the decisions of the tribunals below should be reversed and the certificate heretofore issued by the Mississippi Public Service Commission should be vacated.

JAMES S. EATON.

EATON, COTTRELL, GALLOWAY & LANG
2300 Fourteenth Street
Gulfport, Mississippi

THOMAS H. WATKINS.

WATKINS AND EAGER
800 Plaza Building
Jackson, Mississippi
Attorneys for Mississippi Power Company.

SHERWOOD W. WISE.

WISE, SMITH AND CARTER
918 Electric Building
Jackson, Mississippi
Attorneys for Mississippi Power & Light Company.

Certificate of Service

I, James S. Eaton of the firm of Eaton, Cottrell, Galloway & Lang, of Counsel for Petitioner, Mississippi Power Company, depose and say that on the — day of ——, 1966 I served a copy of the foregoing petition for writ of certiorari on T. Harvey Hedgepeth, Esquire, and David Welch, Esquire, Counsel for South Mississippi Electric Power Association, by mailing the same postage prepaid to their addresses at the Deposit Guaranty Bank Building, Jackson, Mississippi, and 166 Beacon Street, Laurel, Mississippi, respectively, and upon John K. Keyes, Esquire, Attorney of record for Dixie Electric Power Association, Singing River Electric Power Association, Pearl River Valley Electric Power Association, and Southern Pine Electric Power Association, at his office in Collins, Mississippi, and upon Bennett C. Smith, Esquire, Assistant Attorney General, State Office Building, Jackson, Mississippi, Counsel for the Public Service Commission of Mississippi.

JAMES S. EATON.

Sworn to and subscribed before me on this the —— day of ——, 1966.

Notary Public

My commission expires:

APPENDIX NO. 1

IN THE SUPREME COURT OF MISSISSIPPI

No. 43,693

MISSISSIPPI POWER COMPANY, ET AL, *Appellants*,

v.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL, *Appellees*

PATTERSON, Justice:

This is an appeal by Mississippi Power Company and Mississippi Power & Light Company from a final decree of the Chancery Court of Hinds County affirming an order of the Public Service Commission which granted a certificate of public convenience and necessity to South Mississippi Electric Power Association. The order authorized construction and operation of a steam electric generating plant in Jones County and an electric transmission system necessary to its operation in southeast Mississippi.* The purpose of such facility and transmission system is to provide a bulk supply of electricity to four of the corporate members of South Mississippi Electric Power Association. We affirm.

South Mississippi Electric Power Association, hereinafter referred to as petitioner, is a Mississippi corporation organized and operated under the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, Mississippi Code Annotated section 5463 et seq (1956). It has authority to engage in all types of utility operations, including the generation and transmission of electric energy. It is composed of nine corporate members, each of which is an electric power association organized and operated under the

* An electric generating facility of 65-megawatt nameplate rating to be located on a 55-acre site in Jones County, Mississippi, and approximately 392.6 miles of transmission lines extending out from the facility to 26 delivery points of four electric power associations in 17 counties of southeast Mississippi. It is estimated these facilities will cost in excess of $15,000,000.

Electric Power Association Act *supra* and each of which is engaged in the transmission, distribution and sale of electricity to the public. The corporate members of the petitioner are: Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, Coast Electric Power Association, Magnolia Electric Power Association, Southwest Mississippi Electric Power Association, Capital Electric Power Association, and East Mississippi Electric Power Association. Four of these associations, Singing River, Dixie, Southern Pine, and Pearl River Valley, were made respondents to this petition by order of the commission. Though designated as respondents, their position in essence is the same as that of the petitioner as each confesses the petition.

Mississippi Power Company, one of the two protestants, is a foreign corporation authorized to do business in this state. It is a private utility engaged in the business of generating, transmitting, and distributing electricity in the southeastern part of the state.

Mississippi Power & Light Company, the other protestant, was a foreign corporation organized and operated under the laws of Florida, but it is now chartered in Mississippi. It is also a private corporate utility engaged in the business of generating, transmitting and distributing electricity. Its service area is roughly the western part of the state.

These two utilities, Mississippi Power & Light Company and Mississippi Power Company, are hereinafter referred to as the protestants except when specific reference is made to one or the other.

At the present time the electric power associations, individually, purchase their electric power supply from either one or the other of the protestants. These sales by the protestants to the individual associations are authorized by "grandfather certificates" granted to the protestants by the Public Service Commission under the authority of Mississippi Code Annotated. section 7716-05(b) (1956). These grandfather certificates were granted to the protestants as they sold bulk or wholesale supplies of electric

energy to these delivery points at the time of the act. The certificate to Mississippi Power & Light Company (Commission Docket U-44) authorizes it to serve a specified delivery point of Southern Pine. The certificate to Mississippi Power Company (Commission Docket U-99) authorizes it to sell electric energy to the power associations at specified delivery points. However, this certificate is subject to the following restrictive language in the commission's order: "The commission is not hereby adjudicating the legal effect of the certificate herein granted as to service to the aforesaid associations, nor is the commission determining in this proceeding that the certificate herein granted binds said associations to continue receiving such service." At the time this suit was instituted in 1960 these sales to the associations comprised .32% of the total sales of Mississippi Power & Light Company and 4.14% of the total sales of Mississippi Power Company.

The petitioner's application for authority to construct a generating plant and transmission system was filed March 31, 1960, before the commission. The order awarding the certificate of public convenience and necessity was entered on March 7, 1963, upon the completion of a hearing which comprised 78 days. The voluminous 82-volume record in this case contains 478 exhibits and is over 12,000 pages in length. The various motions, pleas, and appeals, including one interlocutory appeal to this Court, are so numerous and lengthy that a discussion of them, which would not reach the merits of the suit, would serve no useful purpose.

Subsequent to the perfection of this appeal, petitioner, on July 20, 1965, filed a petition with the Public Service Commission to amend the certificate theretofore granted to it. Petitioner is now seeking, by this amended petition, to enlarge the facility specified in the certificate. The protestants thereupon filed a plea in bar in this Court alleging in substance that this was an admission on the part of the petitioner that the 65-megawatt generating facility, the subject of this suit, is inadequate, would in fact never be constructed, and therefore, by such admission the cause is rendered moot.

The protestants contend, in addition to the plea in bar, that the order of the commission is not supported by substantial and competent evidence, that the order of the commission violates the "existing facility" rule in that it authorizes an unwarranted duplication of service presently being rendered by protestants. They contend that the order of the commission impairs previously existing certificate rights of the protestants and they contend that under either the "existing facility" rule or the "existing certificate right" they were not accorded the opportunity to correct whatever inadequacy of service there existed as is contemplated by Mississippi Code Annotated section 7716-05(f) (1956), and they were thus deprived of valuable rights without due process of law; and finally, they contend that the commission's order should be reversed as it was predicated upon the operation of facilities in violation of law.

We are of the opinion that the issue raised by the plea in bar is not well taken as more than five years had elapsed from the time of filing the original application for the generating plant and the July 20, 1965 application seeking to enlarge it. The electric industry is fluid; demands for service are constantly fluctuating. These demands are closely related to economic or business trends, the prosperity or lack of it on the part of the consuming public, and many other factors; the daily, weekly, monthly and yearly electrical requirements, though they can be reasonably estimated, are constantly changing. We conclude, as did the Supreme Court of Kentucky, in *Kentucky Utilities Co.* v. *Public Service Commission,* 252 S.W. 2d 885 (1952) that: "The Public Service Commission necessarily must base its decision and actions on the economic conditions existing at the time a case is before it, and it is not in the public interest that a case be prolonged indefinitely by allowing a reconsideration whenever there is a fluctuation in price levels." The issue raised by the plea in bar was not before the commission at the time of the hearing. Without deciding that the same is properly before us, we hold that the conditions existing in 1965 were not necessarily the conditions existing in 1960, the year in which the forecasts were

made as to the electrical needs, and for this reason the plea in bar should be overruled and this appeal restricted to the economic conditions existing at the time the case was before the commission. The issues raised by the amended application are issues to be determined by the commission when properly presented to it.

The protestants next urge that there is no substantial evidence to support the order of the commission. The "substantial evidence" rule is well established in our jurisprudence both by statute and case law. Mississippi Code Annotated section 7716-26(b) (1956) in reference to orders of the Public Service Commission states in part:

> . . . The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

We find the following statement of the rule in the case of *East Mississippi Electric Power Ass'n* v. *Mississippi Power Co.*, 251 Miss. 310, 314, 169 So. 2d 473, 474 (1964):

> The action of the Commission in granting a certificate cannot be overturned if it is supported by substantial evidence, and is not arbitarary or capricious, or beyond its power to make, and does not violate some constitutional right.

See also *Mississippi Power Co.* v. *East Mississippi Electric Power Ass'n*, 249 Miss. 869, 164 So. 2d 479 (1964) and *Mississippi Power & Light Co.* v. *Blake*, 236 Miss. 207, 109 So. 2d 657 (1959) and numerous other Mississippi cases to the same effect. After a careful reading of this record we are of the opinion there was substantial evidence based upon competent testimony to support the findings of the commission and that its order was not arbitrary or capricious. We conclude, therefore, that this assignment of error is not well taken.

The protestants next rely on the "existing facility" rule, sometimes in this state called the Tri-State Transit rule. This rule as stated in *Tri-State Transit Co. of Louisiana, Inc.* v. *Dixie Greyhound Lines, Inc.* 197 Miss. 37, 48, 19 So. 2d 441, 444 (1944) is as follows:

> . . . That a certificate should not be granted where there is existing adequate service over the route applied for, and, if inadequate, unless the existing carrier has been given an opportunity to furnish such additional service as may be required.

This rule has been applied to the issuance of certificates to public electric utilities under Mississippi Laws ch. 372, § 5 (1956) in *Capital Electric Power Ass'n* v. *Mississippi Power & Light Co.*, 240 Miss. 139, 125 So. 2d 739 (1961), though in fact the "existing facility" statute (Miss. Code Ann. § 7642) is a part of the Motor Carrier Act. In *Keith* v. *Bay Springs Tel. Co.* 251 Miss. 106, 114, 168 So. 2d 728, 730, 732 (1964), in applying the rule to radio telephones we held:

> However, the existing facility rule does not apply unless the services and facilities to be rendered by the new certificate are duplicating and result in waste. Section 5(c) of the Public Utility Act reflects an intent to "prevent unnecessary and uneconomic duplication of such facilities as between two" utilities. See also § 5(f). The rule is a limitation upon the commission's power to issue certificates, but it is relevant for the purpose principally of avoiding wasteful duplication of the existing utility service . . . In short, the existing facility rule, developed under the Motor Carrier Regulatory Act, has been applied to an electric utility under the 1956 act. But it should not be used arbitrarily or inflexibly. The Commission is given the power to determine "that the present or future public convenience and the necessity require or will require the operation of such equipment or facility." . . . This is essentially the determination of a matter of

policy, namely, which utility in the opinion of the agency will best serve the public convenience, necessity and welfare.

The Court in Keith *supra* quoted with approval the consideration given such problem in *Utah Light & Traction Co.* v. *Public Service Commission*, 101 Utah 99, 118 P. 2d 683, 690 (1941), wherein it stated:

> Of course the public interest may well be subserved by preventing waste. * * * But the waste must be such as would injure the public or interfere with its interests, growth and development. It must not be a prevention of waste carried to the extreme where it prevents or interferes with progress in equipment or methods or ways of serving the public. And the determination as to whether waste would result, or whether the waste which did result, would be so against the public welfare and interest that it should be prevented, are questions for the commission to determine.

The commission in its detailed and excellent order * found that there was no uneconomic or wasteful duplication though it did find, in a few instances, the transmission lines of petitioner's proposed system would parallel those of the protestants already in place. Their finding in this and other regards is as follows:

> 12. For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow. The need for more generating capacity is greater than the capacity of the facilities which petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective

* The Public Service Commission's order deals with every facet of this case in an able and lucid manner, not an easy task in view of the scientific language of the electrical engineers and of the industry. This order would be incorporated in full in this opinion, but we refrain from doing so due to its necessary length.

groups (Mississippi Power Company is a member of the Southern Company group and Mississippi Power & Light Company is a member of the Middle (South) Utilities, Inc. group) and also with systems outside these groups. There is sufficient evidence to sustain this finding. It is enough to mention that: Mississippi Power Company has found it necessary to begin building immediately for operation in 1965 and 1966 approximately 200,000 to 240,000 KW of generating capacity and a substantial quantity of transmission facilities, not only to handle this particular output but to strengthen its transmission system otherwise; leaving aside the benefits of interconnections, both protestants have already exceeded in loads their generating capabilities with the largest unit in the system down (in other words, without interconnections their generating capabilities will not sustain their load requirements with firm power); Exhibit 23 shows that from 1956 to 1960 Mississippi Power Company's sales to ultimate consumers and electric power associations increased by 49.1%; Exhibit 24 shows that for the same period Mississippi Power & Light Company's increased by 39.2%. Exhibit 211 shows that in a ten year period from 1950 through 1960 the four respondents had an increase in power sales of 260.20% and the nine members of South Mississippi Electric Power Association had an increase of 262.43%.

13. The construction and operation of petitioner's proposed system would not result in uneconomic duplication of facilities of other utilities. This record does not show that any substantial duplication of transmission facilities would be produced by the construction of the proposed system by the petitioner. In virtually all instances protestants' transmission lines were already in place before the delivery points were established thereon to serve the respondents. Only in a few instances would the transmission lines of petitioner's proposed system physically parallel those of protestants. (Rec. pp. 12,377-12,378).

We have heretofore stated that the order of the commission was based upon substantial evidence. The rule announced in Tri-State Transit *supra,* and here repeated in part "that a certificate should not be granted where there is existing adequate service over the route applied for . . ." is urged upon us by the protestants as being applicable here. We cannot agree with this contention. A comparison of Tri-State with the case at bar produces a strained analogy at best. It dealt with the right of two common carriers (bus companies) to offer passenger service to the public over the same route or highway. The commission found that a certificate of public convenience and necessity was not warranted by the facts before it. This order was reversed by the chancery court on appeal and the chancery court's order was reversed by this Court and the commission's order reinstated. Though the "existing facility" rule was announced in the opinion, the case actually turned upon the basis of there being substantial evidence to support the finding of the commission. Here the issues are not directly related to the public. Neither are they related to the same service area, but rather the issues presented here relate to the contested right of two corporate utilities to serve with wholesale electricity a facility (delivery point) or link between or adjacent to two service areas. However, assuming but not deciding that there is a close analogy between the two cases, we still are of the opinion that this assignment of error is not well taken. We rely upon the commission's specific finding that there was no uneconomic duplication here and in so doing we follow precisely the Court's ruling in Tri-State as it too relied specifically upon the finding of the commission as the basis for its decision. Compare Keith *supra* wherein we stated: "The fatal flaw in Monroe's argument is this: There was substantial evidence to support the finding of the Commission . . ." (251 Miss. at 114, 168 So. 2d at 730). We conclude this assignment of error is not well taken.

The protestants further contend that the order of the commission was erroneous in that it impaired valuable rights existing in them by virtue of the "grandfather" certificates they hold which authorize them to sell electric

energy to the power associations. They cite *Capital Electric Power Ass'n* v. *Mississippi Power & Light Co.*, 240 Miss. 139, 150, 125 So. 2d 739, 743 (1961) wherein we held:

> Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable one.

The certificates of the protestants authorize the sale of electricity to specified delivery points. The certificate of Mississippi Power Company is restricted by the following language of the commission:

> The commission is not hereby adjudicating the legal effect of the certificate herein granted as to service to the aforesaid associations, nor is the commission determining in this proceeding that the certificate herein granted binds said associations to continue receiving such service.

There can be no doubt the protestants will be affected to some degree by the certificate granted to the petitioner as .32% of Mississippi Power & Light Company's 1960 business stemmed from its sales to the associations and 4.14% of the business of Mississippi Power Company from its sales for the same period. The generating facilities of the petitioner will supplant these sales to the associations. It is well to keep in mind that petitioner is a federation of nine power associations, respondents being four of them, so in essence petitioner is a corporation through which the associations will generate their own power as they have the statutory right to do under the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, Mississippi Code Annotated section 5463 et seq (1956). The issue thus restricts itself to this narrow question: Do the protestants by their certificated rights to sell, which we have held to be valuable, acquire by the certificates the absolute right

to continue these sales to a utility which desires to generate its own electricity and which has a statutory right so to do? An affirmative answer to this question would indeed render the petitioners captive customers of the protestants who are in reality their competitors. We find no comfort in the authoritites cited by counsel nor were we able to find direct authorities by our own research to answer this perplexing question. We turn again to the commission's finding and order as to the results we should reach. It found:

> For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow. The need for more generating capacity is greater than the capacity of the facilities which the petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective groups. . .

In candor we should state that the commission has not found the services of either of the protestants to be inadequate, but rather found, as noted, there was a need for additional generating capacity broad enough to encompass the 65-megawatt generating facility authorized. Under these circumstances (a deficit of generating capacity) we are of the opinion that the commission properly held the needs of the public above the grandfather certificates of the protestants as we are of the opinion that it was not the legislative intent that a grandfather certificate under Section 7716-05(b) was to supersede the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, which authorized the associations to generate their own energy. The so-called "franchise" doctrine, referred to in the Elton case for example, does not apply to the issuance of a certificate of convenience and necessity for a wholesale electric transmission line. Such a certificate is a privilege, regulated and controlled by the state within due process limitations. The idea that a franchise or charter granted by the state may be immutable and unamendable by the

state was finally and effectively eliminated by the 1890 Constitution. Mississippi Constitution 1890 §§ 178, 179, 180, 181, 182; cf. *Southern Bell Tel. & Tel. Co.* v. *Meridian*, 241 Miss. 678, 131 So. 2d 666 (1961). In reaching this conclusion we note that the loss of sales by the protestants, though not insignificant, is not total as the energy may be diverted to their own needs for which there is ample demand.

Protestants contend further, however, that under the provisions of Section 7716-05(f) they are entitled to the particulars of any inadequacy of service, either under the "existing facility" or "valuable franchise" rule, and that they must be afforded a reasonable time by the commission to correct such inadequacy. This statute provides:

> (f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any *area* covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the *area* affected, may be revoked and cancelled by the commission. (Emphasis ours.)

Protestants urge that since the petitioner did not directly follow the statutory remedy for inadequacy, that, in effect, the petition under Section 7716-05(c) (certificate of public convenience and necessity) is a collateral attack upon their valuable franchise rights and they are deprived of due process thereby. We are of the opinion this contention is not well taken as the statute refers to a specific service

area and not to a facility (delivery point) as here, and there is no finding that the protestants are not rendering "reasonably adequate service", and by the plain terms of the statute the remedial provisions thereof are not applicable until there be such finding. We conclude that this assignment of error is not well taken and that the protestants' constitutional rights were not violated by the order of the commission in this proceeding.

Finally, protestants contend that the commission's order should be reversed because public convenience and necessity cannot be predicted upon the operation of facilities in violation of law. They urge that public convenience and necessity fails when it is shown without dispute that the terms of the federal statute (Title 7, section 904, USCA), and the terms of the loan agreement itself would be violated in that the loan would be used to duplicate existing "central station service."

In the case of *Alabama Electric Cooperative* v. *Alabama Power Co.*, 176 So. 2d 483, 487 (Ala. 1964), the court made the following statement:

> It has been consistently held that the legality of a loan approved by the Administrator of the REA is not subject to a collateral attack in a hearing before a public service commission or the duly constituted state authority which, in Alabama, is the Director of Finance. (Citing cases). In each of these decisions, the question of the violation of the central station service feature of the federal act was raised but, in each instance, the decision was in favor of the cooperatives. In view of the authorities cited supra, we feel that we cannot agree with the contention of appellees that this is a question on which we should pass.

Without deciding whether protestants have standing to raise this question we hold, as did the Alabama court, that this question is not a proper one to be raised in this proceeding.

The electric power associations are products of legislative enactment. They are privileged to use the powers granted in such enactment and are of course subject to its limitations. As such they have legal status comparable to other utilities without this Court's opinion as to the underlying philosophy of the act.

We are of the opinion the cause should be affirmed.

AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX NO. 2

43,693

Monday, February 14, 1966

MISSISSIPPI POWER COMPANY, ET AL,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASS'N. ET AL

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the decree of said Chancery Court rendered in this cause on the 24th day of February 1965 be and the same is hereby affirmed. It is further ordered and adjudged that the appellee do have and recover of and from the appellant and St. Paul Fire & Marine Insurance Company, surety on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Minute Book "BN" Page 503.

APPENDIX NO. 3

Mississippi
PUBLIC SERVICE COMMISSION
Jackson

Before the Public Service Commission of Mississippi

U-508

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

Re: PETITION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT, OPERATE AND MAINTAIN A 65 MEGAWATT ELECTRIC GENERATING STATION IN JONES COUNTY, MISSISSIPPI, AND AN ELECTRIC TRANSMISSION SYSTEM EXTENDING FROM SAID STATION INTO VARIOUS PARTS OF EAST AND SOUTHEAST MISSISSIPPI.

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

On March 31, 1960, petitioner, South Mississippi Electric Power Association, filed its petition for a certificate of public convenience and necessity to construct, operate and maintain an electric generation and transmission system to be composed of a 65 megawatt (nameplate rating) generating station located on a 55 acre site owned by petitioner on the Leaf River about two miles west of the Village of Moselle in Jones County, Mississippi, and approximately 392.6 miles of transmission line extending out from that point to serve at wholesale 26 delivery points of four electric power associations (members of petitioner) in 17 counties in the southeastern part of Mississippi.

The petition set up as grounds both (1) grandfather rights under Section 5(b) of Chapter 372, Mississippi Laws of 1956 (hereinafter referred to as the "Act"); and (2) public convenience and necessity under Section 5(c) of the Act. The alleged factual bases for both grounds were set out in some detail in the petition.

The petitioner had previously on September 28, 1956, filed its application for a "grandfather" certificate under Section 5(b) of the Act (Cause No. U-124). A copy of the petition in U-124 including all exhibits thereto was annexed to and made an exhibit to the petition in this cause (U-508). The theory of the petition in this cause was that petitioner had a right to the certificate sought by virtue of its "grandfather" rights under Section 5(b) of the Act and that these rights had been duly claimed and preserved by the filing of the petition in U-124 within the six months period allowed for that purpose following the effective date of the Act and since that right existed it could, if sustained by the proof, constitute a ground for a certificate in this cause; that apart from "grandfather" rights petitioner also had a right to such a certificate under Section 5(c) of the Act because the public convenience and necessity required and would require that such certificate be issued to it for the reasons set out in the petition; and that both grounds could be asserted in this proceeding.

On April 4, 1960, notice was issued and served in the manner and form provided by statute upon the parties determined by the Commission to be entitled thereto and said notice was published one time in the Jackson Daily News, a daily newspaper having general circulation and published in Jackson, Hinds County, Mississippi, on the 13th day of April, 1960. Proof of such publication in proper form was filed April 15, 1960, and is still on file. The notice was to the effect that the cause was returnable to the regular meeting of the Commission to be held on May 3, 1960; that if no protests were filed by that date the cause would be heard on that date or another day of the term; but if protests should be filed the Commission would on said return day fix a date during the term for hearing the cause.

On April 27, 1960, Mississippi Power Company filed the following:

1. Notice of Desire to Protest and to Participate as an an Interested Party Pursuant to General Order No. 4;

2. Motion to Strike Certain Matters and Allegations Contained in the Petition;
3. Plea in Abatement;
4. Motion to Quash Notice;
5. Motion to Require Singing River Electric Power Association, Lucedale, Mississippi; Dixie Electric Power Association, Laurel, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; and Pearl River Valley Electric Power Association, Columbia, Mississippi; to be made parties as "Co-petitioners"; and
6. Motion to Dismiss the Petition.

On April 27, 1960, Mississippi Power & Light Company filed the following:

1. Notice of Desire to Protest and Participate as an Interested Party Pursuant to General Order No. 4;
2. Motion to Strike Certain Matter from the Petition;
3. Plea in Abatement;
4. Motion to Quash Notice; and
5. Motion to Dismiss Petition.

On May 13, 1960, Mississippi Power & Light Company filed an additional motion to dismiss the petition, adding other grounds.

On May 26, 1960, the Commission, pursuant to motions of protestants Mississippi Power Company and Mississippi Power & Light Company, entered an order allowing thirty days additional time within which protests might be filed, and on June 23, 1960, protests were filed by each of said protestants. The protests essentially denied the material allegations of the petition and set up sundry affirmative matters as grounds for protests, the greater part if not all of which had already been presented in the pleas and motions referred to above.

The pleadings were voluminous and a number of days were required to hear preliminarily the various pleas and motions and make disposition of them. No attempt will be made to recite in this order the step by step proceedings as such would require many pages and is not deemed

necessary. The results of extended hearings upon all the pleas and motions which settled the pleadings and brought the cause to the point of a hearing upon the merits may be summarized as follows:

1. The motions of protestants to strike out certain parts of the petition were sustained in part and overruled in part, resulting in striking from the petition the following matter: The second sentence of paragraph 9; and sub-subparagraphs 1, 2, 3, 5, and 7 of subparagraph (d) of paragraph 23.

2. The motion of Mississippi Power Company to require Singing River, Dixie, Southern Pine and Pearl River Valley Electric Power Associations to enter the cause as "co-petitioners" was treated as a motion to require said corporations to become "parties" and was sustained. The order gave said corporations the option to enter the proceeding as "co-petitioners" at any time within thirty days after the date of the notice issued to them, failing in which they would be treated as respondents. The said corporations did not choose to appear as co-petitioners and therefore became respondents. They filed an appearance and answer as respondents on August 1, 1960, in which they in effect confessed the petition in all its parts.

3. All other of the motions and pleas listed above were overruled. In each instance there was a petition for rehearing of the motion or plea and in each instance such petition was denied.

4. There were motions by both protestants for orders allowing "interlocutory appeals" to the Chancery Court of the First Judicial District of Hinds County on certain of the Commission's orders overruling pleas and motions in order to "settle the controlling principles." These motions were overruled.

5. Meantime petitioner had filed "Response" to the affirmative matter contained in protests of the two protestants.

6. The cause thus reached the point of being ready for hearing upon the merits on the basis of the petition (with the specified deletions); the protests of the two protestants; the responses of petitioner to the affirmative matter contained in the protests; and the answers of the respondents.

7. In the meantime on May 3, 1960, petitioner had filed a motion in this cause and in Cause No. U-124 for consolidation of the two causes for purposes of hearing, and on June 28, 1960, after hearing, that motion was sustained for the reasons set forth in the order of that date. The order specified, however, that the consolidation was for purposes of hearing only and that after hearing separate orders would be entered in the two causes. Therefore, it was the consolidated hearing of the two causes upon the merits that was next in order.

At this juncture, on August 2, 1960, protestants appeared before one of the judges of the Chancery Court of the First Judicial District of Hinds County, Mississippi, and secured an order allowing an appeal to that court upon certain of the orders of the Commission on the pleas and motions aforesaid to "settle the controlling principles"; on the same date protestants also took what were termed "direct appeals" from those orders; therefore, proceedings were suspended before the Commission pending the outcome of the appeals.

The Chancery Court after hearing dismissed the appeals. Protestants then appealed to the Supreme Court of Mississippi and that court, after hearing, likewise dismissed the appeals. The Supreme Court ordered that the cause be remanded to the Commission for hearing upon the merits.

On May 1, 1961, the cause was remanded to the Commission by means of certificate by the Clerk of said Chancery Court, to which was exhibited the supplemental final decree of that court of April 27, 1961, the opinion of the Supreme Court rendered February 27, 1961, and the mandate of the Supreme Court dated April 14, 1961. Thereby the cause was back before the Commission for hearing upon the merits. On May 2, 1961, pursuant to motion of protestants the Commission entered an order resuming jurisdiction of the cause; setting this cause and U-124 for consolidated hearing on the merits on June 6, 1961, a regular meeting date of the Commission; adjudicating the names and addresses of all parties in interest who would be entitled to notice of such consolidated hearing; and ordering that notice of such hearing be given to all such parties in manner and form required by law.

On May 2, 1961, due and proper notice of such consolidated hearing was issued and served upon the parties and persons entitled to such notice as determined by the Commission's order of May 2, 1961, aforesaid, to-wit: Mississippi Power Company, Gulfport, Mississippi; Mississippi Power & Light Company, Jackson, Mississippi; Coast Electric Power Association, Bay St. Louis, Mississippi; Singing River Electric Power Association, Lucedale, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi; Dixie Electric Power Association, Laurel, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; East Mississippi Electric Power Association, Meridian, Mississippi; Central Electric Power Association, Carthage, Mississippi; Yazoo Valley Electric Power Association, Yazoo City, Mississippi; Capital Electric Power Association, Clinton, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Magnolia Electric Power Association, McComb, Mississippi; Mayor and Board of Aldermen, Town of Prentiss, Prentiss, Mississippi; and Mayor and Board of Aldermen, Town of Collins, Collins, Mississippi. Said notice was also published one time in the daily Clarion-Ledger, a daily newspaper of general circulation published in Jackson, Hinds County, Mississippi, on the 10th day of May, 1961. On July 5, 1961, proof of publication of said notice was filed here.

By proper orders entered at the regular June and July, 1961 terms, said hearing was continued and at the regular meeting convened on August 1, 1961, said hearing was set for August 2, 3, 15 and 16, 1961, so that the consolidated hearing of the two causes upon the merits was actually commenced at 10:00 o'clock A.M. on August 2, 1961, and was carried forward on the other specified dates in August, 1961. By intermediate orders entered from time to time, said hearing was recessed and resumed from time to time until the same was finally concluded on December 18, 1962, at which time briefs were received simultaneously from petitioner and the protestants and oral arguments were heard. All told there were 78 hearing days including those devoted to preliminary hearings and those devoted to the merits.

At the conclusion of the hearings on December 18, 1962, the causes were by appropriate order taken under advisement for study of the transcript of the record, the exhibits and the briefs of all parties and for decisions to be handed down at a later date.

From the evidence and the applicable law, the Commission makes the following findings and conclusions:

1. Petitioner is a corporation organized and operating under Chapter 184, Mississippi Laws of 1936 (Section 5463 et seq., Volume 4A, Recompiled, Mississippi Code of 1942) designated by statute as the "Electric Power Association Act". As such it has statutory and charter powers to engage in the generation and transmission of electric energy and to engage in all phases of the electrical business.

2. Petitioner is a membership corporation operated not for profit, and its members consist of Singing River Electric Power Association, Lucedale, Mississippi; Dixie Electric Power Association, Laurel, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi; East Mississippi Electric Power Association, Meridian, Mississippi; Capital Electric Power Association, Clinton, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Magnolia Electric Power Association, McComb, Mississippi; and Coast Electric Power Association, Bay St. Louis, Mississippi.

3. Each of said member corporations is also a nonprofit corporation organized and operating under the Electric Power Association Act aforesaid and each is engaged in the distribution and sale of electricity to and for the public for compensation at the retail level.

4. Petitioner and each of said member corporations are public utilities as defined in Section 1 D (1) of the Act.

5. The petition, after deletions made by the order sustaining the motions to strike, contains all jurisdictional requirements under applicable law and its allegations if sustained by the proof set forth sufficient grounds on both (a) "grandfather" rights under Section 5(b) of the Act, and (b) public convenience and necessity under Section 5(c) of the Act, to warrant the issuance of the certificate of public convenience and necessity prayed for.

6. It was permissible and proper under the facts and circumstances of this cause for the two causes, U-124 and U-508, to be heard together in a consolidated hearing as was done. In such circumstances it was also permissible and proper for the petitioner to assert in its petition in this cause not only the ground of public convenience and necessity but also bring forward and claim and assert the ground of any grandfather rights it might have and which had been duly claimed and applied for in Cause No. U-124. If either grandfather rights or public convenience and necessity, or both, shall be sustained by the proof the issuance of a certificate herein would be in order; if neither is sustained no certificate should be issued.

7. In the opinion of the Commission, petitioner sustained by the evidence its right to a certificate of public convenience and necessity under the "grandfather" clause, Section 5(b) of the Act, for the reasons set forth in a separate order in Cause U-124 this day issued. That order is incorporated herein by reference and made a part hereof.

8. The petition in this cause seeks a certificate of public convenience and necessity to construct, operate and maintain a generation and transmission system briefly described as follows:

(a) A 65 megawatt (nameplate rating) generating station located on a 55 acre site owned by petitioner on the Leaf River about two miles west of Moselle in Jones County, Mississippi, consisting of two steam driven turbo generators, each rated at 22 megawatts, and one gas driven turbo generator rated at approximately 21 megawatts, and with each unit as well as the station as a whole, all incidental and related equipment and facilities are to be included; and

(b) Approximately 392.6 miles of 69 KV transmission line to deliver power to 26 delivery points for sale at wholesale to the four distributing corporations which are respondents herein.

9. The said site appears to be a fit and suitable site for said station and is at an appropriate location with respect to the delivery points to afford efficiency in over-all operations of the generation and transmission system.

10. The primary fuel will be natural gas and a gas line of United Gas Pipe Line Company crosses the site in close proximity to the location of the generating station. The petitioner has arrangements, according to the testimony, with United Gas Pipe Line Company whereby a dependable supply of natural gas is assured. The standby or emergency fuel is oil and the plans for the station include facilities for storage of the oil of a standby supply for up to ten days of operations and the supply may be replenished. The emergency fuel supply appears to be adequate and dependable. The plans call for construction in order that coal facilities can be added if the time ever comes when coal is necessary or more economical for fuel.

11. The record in this cause is exceedingly lengthy (7,154 pages) and the exhibits are many and voluminous (478 in number). Many of the witnesses were experts and necessarily testified as to opinions and their estimates. In some instances these opinions and estimates varied greatly as between witnesses for the petitioner and witnesses for the protestants. The Commission is of the opinion that all of the witnesses were men of ability and integrity. Yet their opinions differed. The fact that there were differences of opinion amongst them does not relieve this Commission of the responsibility of determining the issues presented in this cause.

12. For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow. The need for more generating capacity is greater than the capacity of the facilities which petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective groups (Mississippi Power Company is a member of the Southern Company group and Mississippi Power & Light Company is a member of the Middle Utilities, Inc. group) and also with systems outside these groups. There is sufficient evidence to sustain this finding. It is enough to mention that: Mississippi Power Company has found it necessary to begin building immediately for operation in 1965 and 1966 ap-

proximately 200,000 to 240,000 KW of generating capacity and a substantial quantity of transmission facilities, not only to handle this particular output but to strengthen its transmission system otherwise; leaving aside the benefits of interconnections, both protestants have already exceeded in loads their generating capabilities with the largest unit in the system down (in other words, without interconnections their generating capabilities will not sustain their load requirements with firm power); Exhibit 23 shows that from 1956 to 1960 Mississippi Power Company's sales to ultimate consumers and electric power associations increased by 49.1%; Exhibit 24 shows that for the same period Mississippi Power & Light Company's increased by 39.2% Exhibit 211 shows that in a ten year period from 1950 through 1960 the four respondents had an increase in power sales of 260.20% and the nine members of South Mississippi Electric Power Association had an increase of 262.43%.

13. The construction and operation of petitioner's proposed system would not result in uneconomic duplication of facilities of other utilities. This record does not show that any substantial duplication of transmission facilities would be produced by the construction of the proposed system by the petitioner. In virtually all instances protestants' transmission lines were already in place before the delivery points were established thereon to serve the respondents. Only in a few instances would the transmission lines of petitioner's proposed system physically parallel those of protestants.

14. Petitioner's system if constructed and operated would be a dependable system of modern design and construction, all new, and would provide adequate and dependable service to the respondents. It is contended by protestants that the service would not be as good as respondents now receive at the delivery points now being served because there will be but one generating station or source of power and the transmission system is the "radial" type not providing dual or loop feed. It is difficult to determine which source would provide the more dependable service, the present suppliers or the petitioner, but all things considered the

Commission is of the opinion that the service would be good and dependable from either source. With respect to the lack of dual or loop feed, it is shown by the evidence that petitioner's plans call for closing the loops in its transmission system in the second year of operation and in the meantime the new and modern transmission system with the best of protection against lightning and other hazards should provide an adequate service. This view is sustained by the unqualified opinion of some of the experts. As to the source of power, there is proposed in petitioner's system adequate standby generating facilities.

15. Petitioner has an assured market for its output. It has power supply contracts with the respondents extending to August 11, 1998, and thereafter until one of the parties gives to the other six months notice of cancellation. These contracts cover 26 delivery points and the testimony showed five others to be added within two years of commencing operations. The contracts also provide that other delivery points may be added from time to time by mutual consent. There was some question raised as to the capacity of the system to serve the contract loads, but none as to a sufficient market.

16. In the opinion of the Commission the generating station as planned will have ample capacity to supply the anticipated loads. The loads were estimated by the witness Everett R. Brown with some refinements being added by George B. Taylor. These estimates have not been seriously questioned. Brown is undoubtedly an expert in the field of forecasting loads and has had long experience in that field. Taylor is an electrical engineer and was qualified to make the adjustments he made to interpolate the loads for odd years (Brown's estimates were for even years), shift the loads to fiscal years, omit certain quantities of power not to be supplied by petitioner during the first and second years, and make allowances for diversity and transmission losses. From the testimony in the case in chief there was some doubt that the generating station as planned would carry these loads adequately during the peak period (15 minutes) that occurs once in each year, but this doubt was dispelled by the rebuttal evidence showing considerably

more capacity in each turbo generator unit than was known at the time of presenting the case in chief. This was due to improvements in manufacturing.

17. Petitioner is able to finance the construction of the system for which a certificate is sought. This ability has been seriously questioned by protestants' witnesses, but in our view it is well established. The estimates have been summarized in Exhibit 119 as follows:

"South Mississippi Electric Power Association Summary of Investment Required for the System Expected to Operate Initially July 1, 1964

	Investment
(1) Production Plant	$10,260,800
(2) Transmission Plant	4,727,800
(3) General Plant	126,100
(4) Working Capital	172,000
(5) Overhead During Const.	58,400
(6) Organization & Development	100,000
(7) Total	$15,445,100"

Burns & McDonnell Engineering Company, Kansas City, Missouri, represented by the witness Hartung, made the estimates on the generating station or production plant. These estimates are detailed in Exhibits 113 and 114 and were elaborated upon in the testimony of Mr. Hartung. Pending the hearing, firm contracts were obtained on certain of the heavy equipment (representing nearly 50% of the total estimated cost of the generating station) which showed that the cost of those items would be $206,065 less than estimated. One of the contracts has expired, but the others have been extended and are still in force and they represent $176,065 of the savings under estimates. Moreover, a price reduction was obtained by petitioner through negotiations with the manufacturer on the turbo generators in the amount of $272,000 just before the hearings in this cause were concluded. Therefore, on less than half of the total estimate of the investment in the generating station economies of $448,065 below estimates seem assured.

The cost of the transmission system was estimated by Southern Engineering Company represented by the witness Treadway. Mr. Treadway has had broad experience in this field. The soundness of his estimates were sustained by the testimony of Mr. Stuart C. Irby, Jr., President of Irby Construction Company, Jackson, Mississippi, one of the leading contractors in the country in building electric and telephone lines.

Mr. Irby gave estimates showing minimum and maximum costs of such construction on a per mile basis which he thought would be developed in competitive bidding and testified that his company would take the job for his maximum estimates and possibly take it at his minimum estimates. His maximum estimates were below the estimates of Mr. Treadway. In summary, if the transmission lines were built at Irby's minimum estimates the economy would be $210,761; if at his maximum $52,896.

Mr. Treadway's company also made the estimates and he testified to them on the lesser items of "general plant" (except for one item $11,000 which was supplied by Mr. Hartung), "working capital" and "overhead during construction". The item of "organization and development" was supplied by J. T. Dudley, petitioner's General Manager.

Petitioner's principal means of financing the construction of the system is the proceeds of REA loan commitments aggregating $16,071,000. It, therefore, seems to be reasonably established that petitioner will be able to finance the construction of the system well within available funds.

18. The exhibits and testimony on both sides are voluminous. Neither side made comparisons of cost on bases identical with the other. Neither would admit that any but its own bases were valid. The over-all cost of construction and operation materially affected all estimates and the estimates on these investments varied greatly. The engineers testifying for protestants thought the generating station, the general plant, the transmission system, the staffing of the various phases of the operation, and the mode of operation should be different in many respects, too numerous to undertake detailing, to the plans made by petitioner and its engineers. All these variations meant varia-

tions in investments and operating costs; and even with respect to items which all of the engineers agreed were needed and suitable for their intended purposes, there were substantial differences of opinion as to cost.

To undertake a detailed analysis of all of the studies, exhibits and tabulations and the detailed testimony thereon and point out the differences of opinion amongst the experts and set out in each instance and on each point whether the Commission agreed with this witness or that, and why, would require a book and would be of doubtful value in the end. Suffice it to say, the Commission has examined all of the exhibits and carefully heard their contents explained in great detail by the witnesses, has carefully weighed all the evidence in this regard and having considered the question of costs most carefully there is no way to harmonize the widely varying opinions of the witnesses, and indeed since they proceed in large part upon different premises and bases it is difficult to even compare them.

19. In addition to other considerations, the following matters support the proposition that the public convenience and necessity require and will require that the certificate sought by this proceeding be granted:

(a) On occasions the associations have sought new delivery points believed by them to be needed in their systems, such points to be situated both on the transmission lines of protestants and away from those lines, and those delivery points were denied to them. The associations believe they were made to operate under unfair and uneconomic conditions by these denials on account of line losses, poor voltage regulations and other incidents of spreading their operations too thin in areas where they needed more power and better voltage conditions.

(b) The protestants have declined in some cases to build transmission lines to reach the load centers established by, or believed by the associations to be necessary. The parties are not in agreement as to what constitutes a "load center". Of the 26 delivery points proposed to be served by petitioner eight are not on any transmission line of either protestant. If petitioner provides the supply its transmission lines will reach all these delivery points. If not, ac-

cording to the testimony of witnesses, respondents will be obliged (if they are to have service where they believe they need it) to provide, operate and maintain transmission lines between these points and transmission lines of protestants.

20. To shift the loads involved from the protestants to petitioner will not materially affect that part of the public being served by protestants. Based on 1960 business it would have affected only 4.14% of Mississippi Power Company's revenue, and 0.32% of Mississippi Power & Light Company's revenue.

21. The costs of retiring such limited facilities as protestants have in use in serving the loads involved (the substations belong to the respondents and are located on the transmission lines of protestants) would amount to an economic factor that is negligible in relation to the benefits to the public being served. Mr. J. T. Dudley made an on-the-ground measurement and inventory of all these items and estimated the total for Mississippi Power Company at $55,818 and for Mississippi Power & Light Company $4,000, total $59,818.

22. From all the evidence the Commission is of the opinion and finds that upon the generation and transmission system being constructed and put into operation petitioner will be able to carry on a sound business operation.

23. In the hearings protestants asserted that in order to establish proof of public convenience and necessity the petitioner should have made studies, estimates and forecasts covering its proposed operations for a longer period than it did. Its studies, estimates and forecasts covered a period ending July 1, 1970, which extended approximately nine years from the time the studies were made, including six years of actual operations. The protestants made all of their studies, estimates and forecasts for a period ending July 1, 1974, to include ten years of actual operations. Petitioner contended that it would need to make some addition to the production plant or otherwise arrange

for an added source of power supply in about the year 1971, and some additions might be needed to the transmission system also at about that time, but that when its studies were being made in 1960 and 1961 it was too early to be able to foresee, determine and reduce to actual plans and dollar expenditures those additions; and that such was not necessary in order to show public convenience and necessity for the initial construction for which a certificate is sought in this proceeding. Petitioner's studies and proof did include all additions of every character which it thinks will be necessary and expects to make up to July 1, 1970, and this includes major additions to be put into operation one year after the initial system commences operations. The initial system is planned to commence operations July 1, 1964, and the major additions July 1, 1965. Other minor additions, mostly to the general plant, are planned for subsequent years within the study period. The Commission is of the opinion and finds that the study period employed by petitioner was of sufficient duration for the purpose of determining whether or not public convenience and necessity exists for the issuance of the certificate sought by this proceeding for the initial construction and operation.

24. On the whole record herein the Commission is of the opinion and finds that the petitioner has sustained its petition by the evidence and that the public convenience and necessity requires and will require that a certificate of public convenience and necessity be issued to the petitioner authorizing it to construct, operate and maintain the generation and transmission facilities as fully described in the petition and in accordance with the prayer of the petition.

25. The Commission finds that proper process in the manner and for the time required by law was duly served on all parties in interest herein and that the Commission has full jurisdiction of the parties and the subject matter and has full power and authority to do all that is done herein.

It Is, Therefore, Ordered as follows:

(a) The petitioner, South Mississippi Electric Power Association, be and it is hereby granted a certificate of public convenience and necessity to construct, operate and maintain the following described facilities:

(1) A 65 megawatt electric generating station to be located approximately two miles northwest of the Village of Moselle in Section 33, Township 7 North, Range 13 West, First Judicial District of Jones County, Mississippi, to consist of two steam driven turbo generators, each rated 22,000 kilowatts, and one gas driven turbo generator rated approximately 21,000 kilowatts, each generating unit and said station as a whole to be complete with all auxiliary equipment, machinery and facilities necessary or useful in the operation of said units and said station as a whole, including but not limited to roads, site preparation, parking areas, suitable building to house said station, yard structures, subsurface investigation, yard piping, wells, landscaping, water and fire system, steam generators, closed feed water heaters, deaerator heaters, demineralizing equipment, boiler feed pumps, fuel oil system, fuel handling and control equipment, combustion controls, power piping, stacks, condensers, intake structures, cooling towers, screens, circulating water pumps, circulating water piping, power wiring and insulation, step-up substation, oil circuit breakers, transformers, cranes and all other appropriate and related equipment and facilities of every kind and character suitable and proper to the completion of said generating station; and

(2) Approximately 392.6 miles of 69 KV transmission line (including acquisition of rights of way) and auxiliary equipment and facilities to provide a wholesale supply of electricity to the corporate members of petitioner named below at the delivery points indicated, to-wit:

1. To Singing River Electric Power Association with delivery points as follows:

Location	County
Richton	Perry
Hintonville	Perry
McLain	Greene
Lucedale	George

2. To Pearl River Valley Electric Power Association with delivery points as follows:

Location	County
Hattiesburg	Forrest
Columbia	Marion
Bassfield	Jefferson Davis
Maxie	Forrest
Lumberton	Lamar

3. To Dixie Electric Power Association with delivery points as follows:

Location	County
Waynesboro-West	Wayne
Waynesboro-South	Wayne
Cleo	Jones
Macedonia	Forrest
Moselle-West	Jones
Laurel	Jones

4. To Southern Pine Electric Power Association with delivery points as follows:

Location	County
Collins	Covington
Waldrup	Jasper
Newton	Newton
Rawles Springs	Forrest
Taylorsville	Smith
Sylvarena	Smith

Location	County
Prentiss	Jefferson Davis
Magee	Simpson
Pinola	Simpson
Puckett	Rankin
Morton	Scott

Said transmission lines shall follow generally the routes shown on the map Exhibit 7 in the evidence, a copy of which exhibit is attached hereto marked Exhibit "A" and made a part of this order.

All of such transmission line construction is to be of three No. 4/0 ACSR phase wires with a three-eighths inch H.S.S. shield wire, except for 16.5 miles (from the generating station to the Collins substation) of three 336.4 MCM ACSR phase wires with the same shield wire and 4.3 miles (tap from main line to Richton substation) of three No. 2/0 ACSR phase wires with the same shield wire.

(b) This order and the order this day issued and filed in Cause No. U-124 authorize the construction, operation and maintenance of identical facilities constituting but one generation and transmission system. If for any reason any court having authority superior to that of this Commission should upon any appeal or otherwise hold that petitioner did not qualify for a certicate of public convenience and necessity under Section 5(b) of the Act thereby rendering the order in that cause (U-124) ineffective, and removing from the grounds for this order in this cause (U-508) the ground of grandfather rights under Section 5(b) of the Act, nevertheless this order shall remain in full force and effect as being issued upon a finding and determination by the Commission that the public convenience and necessity requires and will require the issuance hereof and the construction, operation and maintenance of the aforesaid facilities, this finding and determination being in addition to and independent of grandfather rights under Section 5(b) of the Act.

(c) This order shall be in full force and effect on and after its date of issuance.

Adjudged and Ordered By the Public Service Commission of the State of Mississippi and under its official seal on this the 7th day of March, 1963.

O. B. MARSHALL,
Executive Secretary.

APPENDIX NO. 4

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 63,128

MISSISSIPPI POWER COMPANY AND MISSISSIPPI POWER & LIGHT COMPANY, *Appellants,*

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, MISSISSIPPI PUBLIC SERVICE COMMSSION, ET AL, *Appellees*

OPINION OF THE COURT

A restatement of the facts and evidence in this cause is not necessary and to do so would serve no useful purpose. The facts are well known to all of the parties to this cause. Section 5(b) of Chapter 372 of the Mississippi Code of 1942, Recompiled, makes provision for the granting of certificates of convenience and necessity without further evidence for those utilities "engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation being conducted . . .".

The evidence is without much conflict that only plans were being formulated or made or talked about prior to March 29, 1956, as to any construction or operation. There was no construction or operation then being conducted, and the proposals or plans then talked about were disregarded, and entirely new and different systems proposed. In this cause South Mississippi Electric Power Association was not engaged in actual or real construction of the facilities as stated in its application, and does not so contend in the evidence. The Appellee, South Mississippi Power Association, asks for a liberal construction of this statute so as to make its application for grandfather rights effective.

A construction of this statute so as to grant grandfather rights to the Appellee is untenable. The Commission is in error to grant grandfather rights in U-124 or in U-508.

Therefore, the parts of the Orders appealed from dealing with grandfather rights are hereby reversed and set aside.

The questions raised as to convenience and necessity require further discussion. The Legislature saw fit to fix a narrow and straight avenue for consideration in the review of an order and finding of the Mississippi Public Service Commission. (Section 7716-26, Mississippi Code of 1942, Recompiled) Sub-section (d) is as follows:

> (d) The Court may hear and dispose of the appeal in term time or vacation and the Court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the Court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the Court's order as, in the opinion of the Court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the Court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

The Appellants raised many questions for consideration of appeal of fact and of law. The burden of proof was on the petitioning companies, the Mississippi Electric Power Association, as to the facts necessary to prove convenience or necessity, and the Court is of the opinion that the facts as stated in the record, and taking the entire proceeding as a whole, are sufficient and there are no violations of law or the Constitution of the State of Mississippi. The record is lengthy and the volumes of transcribed evidence are numerous. There is a definite conflict in the evidence as shown by the record on all material points in controversy. It is the further opinion of the

Court that there is more than substantial evidence in the record as to the need for the generating system applied for by the petitioning power associations. The Public Service Commission so found in its Order. The question as to the present and future adequacy of the plant was considered by the Commission and it is reasonable to contemplate that the system as applied for will be increased in the future just as other businesses expand from time to time to meet the increased needs of the public.

There was evidence pro and con as to all phases of the proposed operation and the Public Service Commission found that the proposed operations were and are feasible and its proposed services will not be inferior to that presently being provided. There is a definite conflict in the evidence of record on the question of duplication of service by the petitioning company and the Appellants, but the Commission found that there will be no duplication and the evidence thereasto is more than substantial. The Commission also found as a fact that public necessity requires the issuance of the Order in U-508 and that the Order was supported by the evidence.

The questions [were] raised and discussed in the record and the briefs of the parties as to free enterprise and privately owned businesses as against cooperatives and tax supported businesses, but in the opinion of the Court this is a matter for consideration by our State Legislature and does not involve any questions of law in this cause. Our Legislature has fixed the rights of privately owned utilities and of cooperatives and has fixed the limit of review of matters appealed from the Public Service Commission to the Appellate Court. Our Legislature has also seen fit to give rights and privileges to each, which may not be in accord with the thinking of many, but it is the law until it is changed.

Therefore, the Order of the Public Service Commission as to U-508 will be affirmed as to public convenience and necessity, but the Order dealing with grandfather rights in U-124 and U-128 is hereby reversed and set aside.

J. C. Stinnett,
Chancellor.

APPENDIX NO. 5

Book 254, Pages 315, 316, 317, 318, 319, 320, 321 and 322

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 63,128

MISSISSIPPI POWER COMPANY, ET AL., *Appellants*,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL., *Appellees*

FINAL DECREE

This cause came on to be heard upon the appeals of Mississippi Power Company and Mississippi Power & Light Company (jointly made and therefore hereinafter referred to simply as "appeal") from the final order of the Mississippi Public Service Commission (called "Commission") entered on March 7, 1963, in its Docket No. U-124 and the final order of the Commission entered on March 7, 1963, in its Docket No. U-508, each of said orders granting unto South Mississippi Electric Power Association a certificate of public convenience and necessity to construct, operate and maintain an electrical generation and transmission system (the identical system being covered in both orders), the two causes having been consolidated for hearing before the Commission, but separate orders having been entered; and the Court having heard and considered said appeal upon the record made before the Commission and filed herein and having read and considered the briefs of all parties and having heard and considered the oral arguments of counsel for all parties (except the Commission neither filed a brief nor made an argument) and having taken the appeal under advisement for the rendering of a decision after further and full consideration thereof; and the Court having fully considered

said appeal and being fully advised in the premises, from the entire record and applicable law, makes the following findings and conclusions:

1. Appeal was taken jointly by the two Appellants, Protestants before the Commission, and the appeal was heard jointly upon one file in this Court, the Appellants having filed joint briefs, made joint arguments and otherwise prosecuted the appeal jointly, and this was an appropriate procedure.

2. Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association and Pearl River Valley Electric Power Association (corporate members of South Mississippi Electric Power Association) became respondents in the proceeding before the Commission pursuant to a motion filed by Mississippi Power Company, a Protestant before the Commission, and were made Appellees in the appeal, but said Associations have taken virtually no active part in the appeal other than to adopt the brief of Appellee South Mississippi Electric Power Association. The Commission was named as an Appellee in the appeal, but has taken no active part.

3. Appellants and all Appellees (other than the Commission) are each and all public utilities in the field of electricity under the provisions of Chapter 372, Mississippi Laws of 1956 (Section 7716-01, et seq., Volume 6, Recompiled, Mississippi Code of 1942) (called the "Act").

4. The Court has full jurisdiction of the parties and subject matter of this appeal and is authorized to do and adjudicate all that is done and adjudicated herein.

5. The Commission's Docket No. U-124 was a petition of the Appellee, South Mississippi Electric Power Association (called "South Mississippi"), filed September 28, 1956, seeking a so-called "grandfather" certificate of public convenience and necessity under Section 5(b) of the Act to "complete" and to operate and maintain an electric generation and transmission system as therein described, which although not physically under construction on the effective date of the Act, March 29, 1956, was alleged to have been under construction on that date within the meaning and intendment of the Act.

6. The Commission's Docket No. U-508 was a petition of South Mississippi for a certificate of public convenience and necessity to construct, operate and maintain a generation and transmission system as therein described. The petition in this cause sets up as ground for the relief sought both (1) grandfather rights under Section 5(b) of the Act and (2) present and future public convenience and necessity under Section 5(c) of the Act. The alleged factual bases for both grounds were set up in some detail in the petition. The theory of the petition was that South Mississippi had a right to the certificate sought by virtue of grandfather rights under Section 5(b) of the Act, and that this right had been duly preserved by the filing of the petition in Docket No. U-124 within the time allowed by law, and since that right existed, it could, if sustained by the evidence, constitute a ground for a certificate in Docket No. U-508; that apart from grandfather rights, South Mississippi also had a right to the certificate sought by virtue of Section 5(c) of the Act because the public convenience and necessity required and would require that such certificate be issued to it for the reasons alleged; and that both grounds could be asserted in the one proceeding, Docket No. U-508. A copy of the petition, including all exhibits, in Docket No. U-124, was made an exhibit to the petition in Docket No. U-508.

7. Upon motion of South Mississippi, the Commission consolidated the two causes for hearing purposes only, specifying that separate orders would be issued and separate orders were issued as hereinabove set forth.

8. The evidence did not sustain the right of South Mississippi to a so-called grandfather certificate under Section 5(b) of the Act, pursuant to its petition in Docket No. U-124 (and by the same token there was no grandfather right under Section 5(b) of the Act which could serve as a ground for the issuance of a certificate in Docket No. U-508). South Mississippi did not have a generation and transmission system under construction on March 29, 1956, within the meaning of Section 5(b) of the Act. The following parts of the aforesaid final order of the Commission in Docket No. U-508, dated March 7, 1963, are erroneous and illegal findings and conclusions, to-wit:

(a) That part of finding and conclusion numbered 5 "both (a) 'grandfather' rights under Section 5(b) of the Act, and (b)"; and

(b) The entire finding and conclusion numbered 7 reading:

> "In the opinion of the Commission, petitioner sustained by the evidence its right to a certificate of public convenience and necessity under the 'grandfather' clause, Section 5(b) of the Act, for the reasons set forth in a separate order in Cause U-124 this day issued. That order is incorporated herein by reference and made a part hereof."

including the order in Cause U-124 incorporated therein by reference.

9. The evidence was sufficient to sustain the petition of South Mississippi for a certificate of public convenience and necessity under Section 5(c) of the Act, pursuant to its petition in Docket No. U-508. There were many conflicts in the evidence as regards estimates and opinions of experts and on other matters as well, but the evidence taken as a whole more than substantially supported the finding of the Commission that the present and future public convenience and necessity required and would require that the certificate prayed for in South Mississippi's petition in Docket No. U-508 be issued upon the basis of public convenience and necessity.

10. The findings of the Commission in Docket No. U-508 were made in sufficient detail to enable the Court on appeal to determine the controverted questions presented by the proceedings and the basis of the Commission's conclusions.

11. The final order of the Commission in Docket No. U-508 bases the action of the Commission in granting the certificate prayed for therein upon both (1) grandfather rights under Section 5(b) of the Act and (2) present and future public convenience and necessity under Section 5(c) of the Act; but expressly provided that if a Court on appeal should hold the basis of grandfather rights under Section 5(b) of the Act to be erroneous, nevertheless the order

should stand on the basis of public convenience and necessity under Section 5(c) of the Act. The basis of grandfather rights is not sustained by the evidence, is contrary to the manifest weight of the evidence and the order should not be affirmed on that basis. The basis of present and future public convenience and necessity is supported by more than substantial evidence and the granting of the certificate on that basis should be affirmed.

12. The final order in Docket No. U-124 aforesaid should be reversed and set aside.

13. The action of the Commission in granting the certificate of public convenience and necessity to South Mississippi in Docket No. U-508 upon the basis of present and future public convenience and necessity was not erroneous legally, was supported by more than substantial evidence, was not contrary to the weight of the evidence, was not in excess of the statutory authority or jurisdiction of the Commission; nor does it violate statutory or constitutional rights.

14. There was filed herein on November 25, 1964, a joint petition of Appellants and all Appellees (except the Commission) for determination by the Court of the form and amount of security to be given by Appellants pursuant to Section 27 of the Act and the stay order of the Court entered herein on April 19, 1963, to secure other parties against loss due to the delay in the enforcement or carrying out of the aforesaid orders of the Commission in case said orders under review should be affirmed. Pursuant to said petition, the Court entered an order herein on November 25, 1964, approving as the form and amount of security to be so given for said purpose, a bond and an agreement, (tendered and recommended by all petitioners) as follows: (1) An agreement entered into by and between Mississippi Power Company and Mississippi Power and Light Company on the one part, and South Mississippi Electric Power Association on the other, made Exhibit "1" to the petition, and (2) A bond of security in which Mississippi Power Company and Mississippi Power & Light Company are principals, St. Paul Fire & Marine Insurance Company is surety, and South Mississippi Electric Power Association

is obligee, made Exhibit "2" to the petition. The said order in Docket No. U-124 will be reversed, but the said order in Docket No. U-508 will be affirmed (although one of the grounds on which it was based will be held to be invalid). The said security documents and said order of the Court entered November 25, 1964, should remain intact and available to secure South Mississippi against loss in acordance with their terms and provisions and applicable law; and the Court should reserve jurisdiction to consider any appropriate matters and take any appropriate actions in respect thereto should the occasion therefor arise.

It Is, Therefore, Ordered, Adjudged and Decreed as follows:

1. The aforesaid final order of the Mississippi Public Service Commission in its Docket No. U-124, dated March 7, 1963, be and the same is hereby reversed and set aside.

2. The following parts of the aforesaid final order of the Mississippi Public Service Commission in its Docket No. U-508, dated March 7, 1963, be and they are hereby held to be erroneous and illegal findings and conclusions, to-wit:

(a) That part of finding and conclusion numbered 5 reading "both (a) 'grandfather' rights under Section 5(b) of the Act, and (b)"; and

(b) The entire findings and conclusion numbered 7 reading:

> "In the opinion of the Commission, petitioner sustained by the evidence its right to a certificate of public convenience and necessity under the 'grandfather' clause, Section 5(b) of the Act, for the reasons set forth in a separate order in Cause U-124 this day issued. That order is incorporated herein by reference and made a part hereof."

including the order in Cause U-124 incorporated therein by reference.

3. The aforesaid final order of the Mississippi Public Service Commission in its Docket No. U-508, be and the same is hereby adjudged to be, without the parts thereof described in paragraph 2 above, supported by more than

substantial evidence insofar as it grants to South Mississippi Electric Power Association a certificate of public convenience and necessity for the construction, operation and maintenance of the electric generation and transmission system therein described upon the basis of the present and future public convenience and necessity, pursuant to Section 5(c) of the Act and said order of the Mississippi Public Service Commission (except for the parts thereof described in paragraph 2 above) be, and the same is hereby affirmed.

4. The security given by Appellants, Mississippi Power Company and Mississippi Power & Light Company, to secure South Mississippi Electric Power Association against loss due to delay in the enforcement or carrying out of the orders of the Mississippi Public Service Commission appealed from in case said orders should be affirmed, to-wit: the agreement and bond, Exhibits "1" and "2", respectively, to the joint petition of Appellants and all Appellees, other than Mississippi Public Service Commission, filed herein on November 25, 1964, and approved by an order of the Court entered on the same date shall remain on file and intact as security for South Mississippi Electric Power Company in accordance with their terms and provisions; and the Court expressly reserves jurisdiction for all purposes in respect to said security and the enforcement thereof in the event occasion therefor shall arise.

5. The Court's written opinion issued therein, undated, but filed January 14, 1965, is hereby made a part of the record in this cause.

This order shall become effective as a final decree as of the date hereof; however, at the request of Appellants and Appellees (other than Mississippi Public Service Commission) the Court retains jurisdiction of this cause so as to make further order with reference to the taxing of costs incident to this appeal.

Ordered, Adjudged and Decreed this January 22nd, 1965.

/s/ J. C. STENNETT,
Chancellor.

Filed Jan. 22, 1965, Charles A. Scott, Chancery Clerk. By /s/ Mary Taylor, D. C.

APPENDIX NO. 6

HOUSE BILL No. 123

AN ACT to vest authority in the Public Service Commission of the State of Mississippi to regulate certain public utilities; to prescribe the powers and duties of such commission in reference thereto; to levy a tax on the utilities regulated thereby to provide the funds necessary for such regulation; and to transfer regulation of rates of such utilities thereto by amending section 139, chapter 491, Mississippi laws of 1950; and for other related purposes.

WHEREAS, the services of certain public utilities have been extended to large areas of the state, both within and outside of municipalities, and it is in the public interest that the Public Service Commission of the State of Mississippi be vested with authority to regulate such utilities' rates and services, so as to assure reasonably adequate services to the inhabitants of this state at rates which will be fair and reasonable to the consumer, and provide a fair return to said utilities, both of which objectives are necessary to the general welfare of this state; Now, Therefore,

Be it enacted by the Legislature of the State of Mississippi:

Section 1. Definitions. A. The term "corporation," when used in this act, includes a private or public corporation, a municipality, an association, a joint stock association or a business trust.

B. The term "person," when used in this act, includes a natural person, a partnership of two (2) or more persons having a joint or common interest, a co-operative, nonprofit, limited dividend or mutual association, a corporation as hereinbefore defined, or any other legal entity.

C. The term "municipality," when used in this act, includes any incorporated city, town or village.

D. The term "public utility," when used in this act, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) The generation, manufacture, transmission or distribution of electricity to or for the public for compensation.

(2) The transmission, sale, sale for resale, or distribution of natural, artificial, or mixed natural and artificial gas to the public for compensation by means of transportation, transmission, or distribution facilities and equipment located within this state, but shall not include the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, nor the distribution or sale of liquefied petroleum gas.

(3) The transmission, conveyance or reception of any message over wire, or by radio, or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation; and the furnishing, or the furnishing and maintenance, of equipment or facilities to the public, for compensation, for use as a private communications system or part thereof; provided, that no persons or corporations not otherwise a public utility within the meaning of this act shall be deemed such solely because of engaging in this state in the furnishing, for private use as last aforementioned; and provided further that nothing in this act shall be construed to apply to television stations, radio stations or community television antenna services.

(4) The transmission, distribution, sale or resale of water to the public for compensation.

(5) The term "public utility", shall not include any person not otherwise a public utility, who furnishes the services or commodity described in sections 1 D (1), 1 D (2), 1 D (3) and 1 D (4) of this act only to himself, his employees or tenants as an incident of such employee service or tenancy, and provided such services are not sold or resold to such tenants or employees on a metered or consumption basis.

E. The term "rate," when used in this act, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility for any service, product or commodity described in this section, offered by it to the public, and any rules, regulations, practices or contracts

relating to any such compensation, charge, fare, toll, rental or classification; except, however, the term "rate" shall not include charges for electrical current furnished, delivered or sold by one public utility to another for resale.

F. A public utility's business other than of the character defined in subparagraphs (1) to (4) of subsection D of this section is not subject to the provisions of this act.

G. The word "commission," when used in this act, shall refer to the Public Service Commission of the State of Mississippi as now existing, unless otherwise indicated.

H. Any public utility as defined in paragraph D above, owned or operated by a municipality shall not be subject to the provisions of this act, except as to extension of utilities greater than one mile outside of corporate boundaries after the effective date of this act.

Section 2. Additional staff of the commission.—For the purposes of administration of this act, the commission is hereby authorized to employ, in addition to personnel already employed by the commission, a chief accountant and a chief engineer, the salaries of whom shall be fixed by the commission. The commission may also employ, and fix the compensation of, such additional personnel as the commission finds necessary to perform the duties of the commission imposed upon it by the provisions of this act. All such members of the staff and other personnel shall be appointed by the commission and shall be subject to removal at any time by the commission, and the commission shall prescribe the duties thereof. The chief accountant shall be a public accountant or a certified public accountant licensed to practice in this state and qualified by experience and training in accounting. The chief engineer shall be an engineer licensed to practice in this state and qualified by experience and training in utility engineering. The chief accountant and chief engineer shall devote their full time to the performance of their duties and shall take an oath faithfully to perform the duties of their position. The commission may require such bonds to be carried on such employees as the commission may deem necessary, the cost thereof to be paid by the commission. Insofar as possible to do so, the personnel of the commission shall be retained on a full-time

basis and shall have no other employment of any kind. As to any part-time or specially employed person, the minutes of the commission shall recite the necessity for deviation from full-time employment.

Nothing in this section should be interpreted to prevent the commission from utilizing the services of the additional personnel herein provided in rendering assistance to the commission in its other duties where such assignment does not interfere with duties in administering the provisions of this act.

Section 3. Legal representative.—The attorney general shall appoint an assistant attorney general on a full-time basis to assist and advise the commission in all matters affecting its powers and duties and perform such duties and services in connection with this act and the enforcement thereof as the commission may require. Such assistant attorney general shall be in addition to the assistant attorneys general now provided by law, and his qualifications, term of office, and salary shall be the same as those provided by law for other assistant attorneys general, but his salary and expenses shall be paid in the same manner and from the same funds as the salary and expenses of the commissioners.

The assistant attorney general assigned to the commission shall upon request of the commission represent and appear for the commission in all actions and proceedings involving any question under this act, and shall aid in any investigation or hearing had under the provisions hereof.

Section 4. General jurisdiction and powers.—Subject to the limitations imposed in this act, and in accordance with the provisions hereof the commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities as herein defined, except and provided, however, that the commission shall not have jurisdiction over the production and gathering of natural gas, or the sale of natural gas in or within the vicinity of the field where produced, nor over the facilities and equipment utilized in any such operations including but not limited to such facilities as separators, scrubbers, and gasoline plants of all types. Provided, further, the commission shall

not have jurisdiction to regulate the rates for the following sale of commodities or services: (1) sales of gas, water or electricity by municipalities to such persons as said municipalities are authorized by law to serve; (2) sales of gas or electricity by co-operative gas or electric power associations to the members thereof as consumers, except as provided by section 5, paragraphs (d) and (e) where service is rendered in a municipality.)

Section 5. Certificate of public convenience and necessity: when required.—No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1, of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mis-

sissippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in case of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality of such utilities, including cooperatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) and in the case of a utility defined in 1 D (3) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate

service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that the cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said

certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the case of a public utility as defined in section 1 D (3) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

Section 6. Extension of service.—The commission may, after hearing, upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities within the certificated area upon findings and order that such extension is reasonable and practicable, and provided further, that in the case of gas and water a sufficient supply is available and obtainable therefor.

Section 7. Accounts and depreciation reports of utilities. —The commission by rules and regulations, after notice and hearing, may establish a system of accounts to be kept by the public utilities, the rates of which are subject to regulation by the provisions of this act, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept, provided that in the case of any utility regulated by the federal power commission, the federal communications commission, or other federal commission, compliance with any system of accounts prescribed for the particular class of utilities by such federal commission may be deemed a sufficient compliance with the requirements of the state commission made hereunder. Provided further, that the state commission may prescribe supplemental or modified methods for systems of accounts, where such does not conflict with those prescribed by the federal commission.

For the purpose of the administration of this act the commission may, after hearing, by order in writing require every public utility or class of public utilities, the rates of

which are subject to regulation by the provisions of this act, to carry a reasonable or adequate depreciation account in accordance with such rules, regulations, orders and forms of account as the commission may prescribe; and the commission may, from time to time, ascertain and determine, and by order fix the proper and adequate rates of depreciation of the several classes of property of such public utility or class of public utilities; provided, however, that in the case of any utility regulated by the federal power commission, the federal communications commission, or other federal commission, compliance with or use of any depreciation accounts and depreciation rates prescribed by such federal commission may be deemed a sufficient compliance with the requirements of the state commission made hereunder. Such public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed. Provided further, that the state commission may prescribe supplemental or modified depreciation accounts and rates where found just and reasonable and not in conflict with such system of accounts prescribed by the federal commissions, subject to review by the commission on petition or complaint of the utilities affected.

Section 8. Rates, classifications and service of utilities—(a) No rate made, deposit or service charge demanded or received by any public utility shall exceed that which is just and reasonable. Such public utility, the rates of which are subject to regulation under the provisions of this act, may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person. Rates prescribed by the commission shall be such as to yield a fair rate of return to the utility furnishing service, upon the reasonable value of the property of the utility used or useful in furnishing service.

(b) Such utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service. The commission may, after hearing upon reasonable notice had, upon its own motion or upon complaint, ascertain and fix just and reasonable standards, regulations and practices of service which are to be furnished, imposed, ob-

served, and followed by all public utilities. The commission may require the service, rules and regulations of each public utility to be filed with the commission and subjected to its approval or to such changes therein as the commission reasonably may require. Practices required or sanctioned pursuant to the provisions hereof shall supersede other requirements of law.

(c) Such utility may employ in the conduct of its business suitable and reasonable classifications of its service, patrons, rates, deposits and service charges. The classification may, in any proper case, take into account the nature of the use, the quantity and quality used, the time when used, the purpose for which used, and any other reasonable consideration.

Section 9. Rate schedules.—Under such reasonable rules and regulations as the commission may prescribe, every public utility, the rates of which are subject to regulation under the provisions of this act, shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates and charges established by it and collected and enforced, or to be collected or enforced within the jurisdiction of the commission. The utility shall keep copies of such schedules open to public inspection under such reasonable rules and regulations as the commission may prescribe.

No such public utility shall directly or indirectly, by any device whatsoever, or in anywise, charge, demand, collect or receive from any person or corporation for any service rendered or to be rendered by such public utility a greater or less compensation than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this act, nor shall any person or corporation receive or accept any service from any such public utility for a compensation greater or less than that prescribed in such schedules.

Utilities of the same type as herein covered, engaged in rendering interstate service to and from points and places in this state shall file with the commission tariffs of rates and charges of such and rates and charges affecting service to or from points and places in the state. Also utilities

selling commodities or rendering any service to co-operatives, municipalities or other nonprofit organizations, shall, at the order of the commission, file schedules of such rates and charges for information purposes only.

The commission may provide by rules and regulations to be adopted by it, that utilities may contract with a manufacturer who is not a utility for furnishing the services or commodities described in section 1 D (1), 1 D (2), and 1 D (3) of this act for use in manufacturing, without reference to the rates or other conditions which may be established or fixed pursuant to other provisions of this act. Such regulations shall provide that before becoming effective any such contract shall be approved by the commission.

Section 10. Changes in rates.—Unless the commission otherwise orders, no public utility shall make any change in any rate which has been duly established under this act, except after thirty (30) days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The commission shall give such notice of the proposed changes to such other interested persons as the commission, in its discretion, may determine. The proposed changes may be shown by filing new schedules, by plainly indicating the changes upon schedules filed and in force at the time and kept open to public inspection, or in such other manner as will clearly indicate the rates to be changed and the rates proposed.

The commission, for good cause shown, may allow changes in rates, without requiring the thirty (30) days' notice, under such conditions as it may prescribe. All such changes will be immediately indicated upon its schedules by such public utility.

Whenever there is filed with the commission by any public utility any schedule or notice stating a rate or rates differing from the rate or rates theretofore in effect, the commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon the commission,

upon delivering to the utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than ninety (90) days beyond the time when such rate or rates would otherwise go into effect unless the commission shall find that a longer time will be required for its determinations, in which case the commission may extend the period for not to exceed six (6) months from the date of filing such schedule. Notwithstanding any such order of suspension, the public utility may put such suspended rate or rates into effect on the date when it or they would have become effective if not so suspended, by filing with the commission a bond in a reasonable amount approved by the commission, with sureties approved by the commission, conditioned upon the refund, in a manner and to the parties to be prescribed by order of the commission, of the amount of the excess, with lawful interest thereon, if the rate or rates so put into effect are finally determined to be excessive; or there may be substituted for such bond, other arrangements satisfactory to the commission for the protection of the parties interested. During any such period when suspended rates are in effect under bond or other arrangement the commission may, in its discretion, require that the public utility involved shall keep an accurate account of payments made under the rate or rates which the public utility has put into operation in excess of the rate or rates in effect immediately prior thereto.

If, after such hearing, the commission shall find any such rate or rates to be unjust, unreasonable or unreasonably discriminatory, or in anywise in violation of the law, the same shall be set aside and the commission shall determine and fix by order such rate or rates as will yield a fair rate of return to the public utility for furnishing service to the public and shall make and file its conclusions and findings of fact supporting such order. A copy of such order shall be served upon the utility in the manner herein provided, and the rates fixed by the commission shall be the legal rates until changed as herein prescribed; provided, however, that rates in effect under bond, or other arrangements

satisfactory to the commission, may be continued in effect by the utility under the terms and conditions of said bond or other arrangement pending final determination of any appeal.

Section 11. Rates fixed by commission.—Whenever the commission, after hearing had on reasonable notice finds that the existing rates in effect and collected by any public utility are materially excessive or insufficient or unreasonably discriminatory, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates which will yield a fair rate of return to the utility for furnishing service, which rates will thereafter be observed and in force; and said rates shall thereupon become the legal rates to be charged and paid until changed, unless suspended as herein provided.

The commission shall have power, when deemed by it necessary to prevent injury to the business or interest of the people or any public utility of this state in case of any emergency, to permit any public utility to temporarily alter, amend, or suspend any existing rates, schedules and order relating to or affecting any public utility or part of any public utility in this state.

Section 12. Rate base.—In regulating the rates of any public utility hereunder, the commission shall, on hearing after reasonable notice, ascertain and fix the rate base of the property of the public utility when the same is relevant or material to the exercise or the jurisdiction of the commission, and may make readjustments from time to time and ascertain the cost of all new construction, extensions and additions to the property of every public utility. In arriving at such rate base the commission shall give due consideration to all elements that are generally considered in determining the rate base for rate making purposes.

Valuations of property of such a public utility for rate making purposes shall not include property purchased, labor supplied or services rendered by any firm or corporation owned or controlled in whole or in part directly or indirectly by such public utility, or which owns or controls in whole or in part directly or indirectly such public utility, unless such firm or corporation permits the commission to

have access to such of the books and records of such firm or corporation as may be necessary in the opinion of the commission to enable the commission to determine whether such labor, materials, property or services rendered were supplied at a reasonable price.

The commission shall not value or revalue the property of any utility unless the valuation or revaluation is necessary or advisable in order to determine the legality or reasonableness of any rate of service, and then only after an investigation of the rate or service, and a hearing has been held on reasonable notice.

Whenever the commission is required in administering this act to find the value of gas in the field where produced, such value shall be determined as the amount paid therefore by the public utility in the field pursuant to arm's length contract, and in the absence of such arm's length contract, the fair market value of such gas as a commodity in the field.

Section 13. Rules and regulations.—The commission shall have power to prescribe, issue, amend and rescind such reasonable rules and regulations as may be reasonably necessary or appropriate to carry out the provisions of this act; provided, however, that no rule or regulation shall be effective until thirty (30) days after copies of the proposed rule or regulation shall have been mailed to public utilities affected thereby, and a notice setting forth either the terms or substance thereof and the time and place of a hearing thereon shall have been published in a newspaper of general circulation in the state and published in the City of Jackson. Such hearing may be held at any time twenty (20) days after date of publication of such notice, but such rules shall not become effective until a hearing thereon; provided further, that the commission may make its initial set of rules and regulations effective at the end of such thirty (30) day period, subject to review thereof. All rules and regulations of the commission shall be filed with its secretary and shall be readily available for public inspection and examination during reasonable business hours. Any interested person shall have the right to petition the commission for the issuance, amendment or repeal of a rule or regulation.

Section 14. Hearings.—The commission may, in addition to the hearing specially provided by this act, conduct such other hearings as may be required in the administration of the powers and duties conferred upon it by this act.

The commission shall fix the time and place of hearings, if any is required, and shall serve notice thereof, not less than twenty (20) days before the time set for such hearings, unless the commission shall find that public convenience or necessity requires that such hearings be held at an earlier date. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights. Notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi.

At the time fixed for any hearing before the commission, or the time to which the same may have been continued, the complainant and the person complained of shall be entitled in person or by attorney to be heard and to introduce evidence.

Section 15. Process.—The commission may issue subpoenas, subpoenas duces tecum and all necessary process in proceedings pending before it, and such process shall extend to all parts of the state and may be served by any person authorized to serve process of courts of record. All process issued by the commission shall be signed by the chairman or secretary of the commission and the seal of the commission shall be affixed thereto.

Section 16. Witnesses.—The commission and each of the commissioners, for the purpose mentioned in this act, may administer oaths, examine witnesses and certify official acts. In case of failure on the part of any person or persons to comply with any lawful order of the commission, or with any subpoena or subpoenas duces tecum, or in the case of the refusal of any witness to testify concerning any matter on which he may be interrogated lawfully, any court of record of general jurisdiction or a judge thereof, may on application of the commission com-

pel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.

Section 17. Depositions by agreement.—Upon agreement of the parties in any proceeding, depositions of any witnesses may be taken and used in evidence pursuant to procedure for taking depositions which may be prescribed by rules and regulations of the commission.

Section 18. Certified copies—evidence.—Copies of official documents and orders filed or deposited according to law in the office of the commission, certified by a commissioner or by the secretary under the official seal of the commission to be true copies of the original shall be evidence in like manner as the originals, in all matters before the commission and in the courts of this state, or any other state or jurisdiction.

Section 19. Recording orders.—Every order, finding, authorization or certificate issued or approved by the commission under any provisions of this act shall be in writing and entered on the minutes of the commission. A certificate under the seal of the commission that any such order, finding, authorization or certificate has not been modified, stayed, suspended or revoked, shall be received as evidence in any proceeding as to the facts therein stated.

Section 20. Reports by utilities.—The commission may require, by order served on any public utility in the manner provided herein for the service of orders, the filing of such relevant reports, information or data at such time and place as it may reasonably designate.

The commission shall at all reasonable times have access to and the right to inspect and examine all accounts, records, memoranda and property of the public utilities hereunder, and it shall be the duty of such public utilities to furnish to the commission, within such reasonable time as the commission may order, any information with respect thereto which the commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the commission free access to its property and accounts, records and memoranda when requested so to do. No mem-

ber, officer or employee of the commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, or property, as hereinbefore provided, except in so far as he may be directed by the commission or by a court.

Section 21. Service on parties.—Service in all hearings, investigations and proceedings pending before the commission shall be made personally in the manner in which process is required by law to be served or by registered, or certified mail, as the commission may direct.

Section 22. Decisions.—After the conclusion of a hearing, the commission shall make and file its findings and order, and its opinion, if any. All findings shall be supported by substantial evidence presented in the hearing and shall be in sufficient detail to enable the court on appeal to determine the contraverted questions presented by the proceeding, and the basis of the commission's conclusion. A copy of such order certified under the seal of the commission, shall be served upon the person against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings or their attorneys. Said order shall take effect twenty (20) days after the service thereof, unless otherwise provided, and shall continue in force, either for a period which may be designated therein or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within twenty (20) days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

Section 23. Alteration of orders.—The commission may at any time, after notice, and after opportunity to be heard as provided in section 14 of this act, rescind, or amend any order or decision made by it. Any order rescinding, or amending a prior order or decision shall, when served upon the utility affected and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders or decisions, but no

such order shall affect the legality or validity of any acts done by said utility before service upon it of the notice of such change.

Section 24. Record of proceedings.—A full and complete record shall be kept of all proceedings had before the commission or any commissioner or any formal hearing, and all testimony shall be taken down by a reporter appointed by the commission, whose qualifications and compensations shall be the same as now provided by law for the circuit and chancery court reporters.

Section 25. Rehearing.—After an order or decision has been made by the commission, any party to the proceedings may, within thirty (30) days after the entry of the order or decision, apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for rehearing, and the commission may grant and hold such rehearings on such matters.

The filing of an application for rehearing shall not stay or suspend the effective date of any commission order or the obligation of any person to comply in all respects with such order unless the commission shall, in the exercise of its discretion, stay, suspend or modify such order. Any party to the proceedings shall be entitled to a stay of the order, as a matter of right, upon filing with the commission a bond payable to the State of Mississippi in such amount and with sufficient surety, both as determined by the commission, to insure the prompt payment of any damages or refunds to the party or persons entitled thereto, if the order shall, at the conclusion of any subsequent proceedings, become effective.

The commission shall either grant or refuse an application for rehearing within twenty (20) days after the date of application therefor; and a failure by the commission to act upon such application within that period shall be deemed refusal thereof. If the application is granted, the commission shall enter a new order after the rehearing shall have been concluded, which shall become effective ten (10) days after such order is entered, unless otherwise provided by the commission for reasonable cause.

Section 26. Review.—(a) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c). No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the court may also, in its discretion,

remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

Section 27. Stay of orders.—The pendency of proceedings to review shall not of itself stay or suspend the operation of the order of the commission, except in the case of a rate order where the utility has put rates into effect under bond as provided in section 10. However, any party may, as a matter of right, secure from the court in which a review of or appeal from the order of the commission is sought an order suspending or staying the operation of the order of the commission pending a review of such order, by adequately securing the other parties against loss due to the delay in the enforcement of the order in case the order under review is affirmed, the security to be in such form and amount as shall be directed by the court granting the stay or suspension.

If an appeal be taken from an order of the commission reducing existing rates or refusing to approve rates proposed by a utility, the court, in suspending the order of the commission, shall permit the utility to continue the existing rates in effect or to place the proposed rates in effect, pending final determination of the appeal, upon filing with the court a bond in a reasonable amount approved by the court, with sureties approved by the court, conditioned upon the refund, with lawful interest, to the parties entitled thereto, of the amount of the excess if the existing rate or rates or the rate or rates so put into effect are finally determined to be excessive; or the court may, if a utility has put rates into effect under bond as provided in section 10 of the act, require the utility to file a bond conditioned as herein provided for such additional amount as the court deems proper.

Section 28. Appeals.—Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

If the party taking the appeal has theretofore furnished security as provided in section 27 of this act, or, in the case of an appeal from a judgment involving an order of the commission affecting rates, has filed a bond conditioned as provided in section 10 or section 27, the taking of an appeal to the Supreme Court shall operate as a supersedeas without the furnishing of further security or bond, provided, that in such cases the Supreme Court may, upon application to it, require such additional security, or such additional bond conditioned as provided in section 10 or section 27, as in its opinion will adequately secure the other party to the appeal, or parties who may become entitled to refunds, against loss in the event the judgment under review is affirmed.

Section 29. Preference in all courts.—All commission matters appealed to any court shall take preference over other cases as a matter affecting the public interest and all courts shall docket and dispose of such causes at the earliest moment compatible with the ends of justice.

Section 30. Enforcement of commission orders.—The commission may apply to the Chancery Court, First Judicial District of Hinds County, Mississippi, for enforcement, by mandamus, injunction or other appropriate remedy, of any order of the commission.

Section 31. Burden of proof.—In all actions and proceedings arising under the provisions of this act or growing out of the exercise of the authority and powers herein granted to the commission, the burden of proof shall be on the party seeking to vacate an order of said commission.

Section 32. Violations.—Any person or corporation which willfully and knowingly violates any provision of this act, or which fails, omits or neglects to obey, observe or comply with any lawful order, or any part or provision thereof, of the commission shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not more than two hundred dollars ($200.00).

Section 33. Continuing violation.—Every violation of the provisions of this act or of any lawful order of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense, and in case of a continuing violation after a first conviction each day's continuance thereof shall be deemed to be a separate and distinct offense.

Section 34. Penalties cumulative.—All penalties accruing under this act shall be cumulative, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any public utility or any officer, director, agent or employee thereof or any other corporation or person.

Section 35. Suit for penalties.—Actions to recover penalties under this act shall be brought in the name of the State of Mississippi in any court of competent jurisdiction; provided, however, that no action for penalty may be maintained after the expiration of one year from the date of the act of which complaint is made.

Section 36. Utilities taxed expense of regulation by commission.—All reasonable and necessary expenses of the administration of the duties imposed on the commission by this act, including the salaries of personnel authorized under section 2 of this act, but not including the salaries of the commissioners, shall be provided as follows: There is hereby levied a tax upon all utilities, the rates of which are subject to regulation by the provisions of this act, such levy to be effective on the first day of each year and to be calculated as follows: The amount of said tax is the sum of two hundred thousand dollars ($200,000.00) per year, which shall be prorated by the state tax commission among the utilities whose rates are subject to regulation under the provisions of this act, each year, according to the gross revenue of each of such utilities from their intrastate operations during the calendar year preceding the assessment. Each utility, the rates of which are subject to regulation under the provisions of this act, shall file a statement of such gross revenue by April 1 of each year showing the gross revenue for the preceding year's operation. Provided, however,

that for the year 1956, such statement of gross revenue for the preceding year shall be filed by May 1, 1956. These statements of gross revenue shall be filed with the commission and a copy thereof filed with the state tax commission. The state tax commission shall thereupon calculate the pro rata amount of tax to be paid by each of said utilities in order to provide the total amount above stated and shall thereupon submit a statement thereof to the respective utilities and the amount shown due in such statements to the respective utilities shall be paid by the respective utilities within thirty (30) days thereafter to the state tax commission. The state tax commission shall on or before the last day of each month succeeding the month in which such payments were received pay same into the state treasury to the credit of "Utilities Regulation Special Fund." If any utility covered by the provisions of this act shall fail to pay its pro rata part of the tax herein provided, such amount shall bear interest at the rate of one half of one per centum (½ of 1%) per month from due date until paid; and a penalty in addition to any or all other penalties provided elsewhere in this act of not exceeding fifty per centum (50%) of the amount of such tax may be added for failure to pay such tax when due. In administering the provisions of this section, the state tax commission shall authorize the execution of any necessary orders, warrants, or other instruments by its chairman; and for the purposes of collecting any amount due hereunder the said state tax commission over the signature of its chairman may issue warrants for the collection of any unpaid taxes, penalties and interest due hereunder, under the same terms and conditions, and with the same power and effect as is provided and set forth in the statute governing issuance of warrants under the income tax laws of this state. The term "gross revenue" as used in this section shall be deemed to be the total amount of all revenue derived by each of such utilities from its intrastate operations, and the state tax commission is hereby authorized to use all tax returns of any such utilities available to it and to make such audits as may be deemed necessary of any and all records of such utilities in order to correctly determine the amount of such gross revenue.

It shall be the duty of the state auditor to advise the commission of the amount of money on hand from time to time. All expenses of the commission authorized by this act, or any other act of the legislature, shall be paid by the state treasurer upon warrants issued by the state auditor of public accounts, which warrants shall be issued upon requisition signed by the chairman of the commission and countersigned by one of the commissioners and said requisition shall show upon its face the purpose for which the payment is being made by reference to the minute book in which such payment was authorized. It shall be unlawful for any person to withdraw any money from said fund other than by requisition issued as herein provided. A record of all requisitions issued by the commission showing to whom, for what purpose, and date issued, shall be placed upon the minute books of the commission and shall become a part of the official record of the commission.

The books and accounts of the commission shall be audited at the end of each fiscal year, and at any other time deemed necessary, by the state auditor and a copy of such audits shall be furnished to the governor and the commission. The state auditor may prescribe such further accounting procedure as he deems necessary for the withdrawal of funds by the commission from said special fund. All requisitions drawn in compliance with this act shall be honored by the state auditor and the funds disbursed in accordance therewith. The commission shall file a report at each regular session of the legislature showing the expenditure of all funds by the commission. All proceeds of the above-mentioned tax are hereby allocated to the commission for the purpose of this act. In the event the funds provided by said tax exceed the amount necessary for the purposes of this act at the end of any biennium, the commission shall certify the amount which the commission estimates will be necessary for the commission for each year of the next biennium to the state tax commission, and the state tax commission shall reduce the tax hereby imposed to such amount for each of said years in the coming biennium and shall collect the proportionate amount thereof as above provided.

Section 37. Amendment of section 139, chapter 491 of the laws of Mississippi, 1950, to eliminate gas and electric companies.—Section 139, chapter 491 of the laws of Mississippi, 1950, is hereby amended to read as follows:

The governing authorities of municipalities shall have the power to prescribe by ordinance maximum rates and charges for the supply of water furnished by an individual, company or corporation to the municipality and its inhabitants, or either, such rates and charges to be just and reasonable. If the rates and charges prescribed be unjust and unreasonable, they may be reviewed and determined by the chancery court of the county.

Section 38. Separability of provisions.—If any provision of this act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Section 39. Repeal of conflicting acts.—Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act.

Section 40. Effective date.—The effective date of this act shall be from and after its passage.

Approved March 29, 1956.

APPENDIX NO. 7

§ 904. Loans by Administrator for electrical plants and transmission lines; preferences; consent of State authorities

The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided,* That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of whch comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five

years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: ***And provided further,*** That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed. May 20, 1936, c. 432, Title I, § 4, 49 Stat. 1365; Sept. 21, 1944, c. 412, Title V, §§ 502(a), 503, 58 Stat. 739; Dec. 23, 1944, c. 725, 58 Stat. 925; June 29, 1948, c. 703, 62 Stat. 1070; Oct. 28, 1949, c. 776, §§ 2, 4(e), 63 Stat. 948; June 15, 1955, c. 139, § 2, 69 Stat. 132.

APPENDIX NO. 8

Mississippi
PUBLIC SERVICE COMMISSION
Jackson

Docket No. U-99

IN THE MATTER OF THE APPLICATION OF MISSISSIPPI POWER COMPANY, A CORPORATION, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, PURSUANT TO HOUSE BILL 123 OF THE 1956 GENERAL SESSION OF THE LEGISLATURE OF MISSISSIPPI, PERMITTING ITS OPERATION AS A PUBLIC UTILITY RENDERING ELECTRIC SERVICE TO THE PUBLIC.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

This cause came on for hearing before the Public Service Commission of the State of Mississippi at its offices in the State Office Building in Jackson, Hinds County, Mississippi, on pleadings filed by the applicant, Mississippi Power Company, and by seven protestants, to-wit: East Mississippi Electric Power Association, Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, Coast Electric Power Association, and South Mississippi Electric Power Association, said pleadings being filed by the applicant and by protestant as follows:

JURISDICTIONAL RECITALS

1. On September 26, 1956; the Applicant, Mississippi Power Company (hereinafter called Applicant), a corporation organized under the Laws of the State of Maine and authorized to do business in the State of Mississippi, filed its application under the provisions of Section 5 (b) of Chapter 372, Laws of Mississippi of 1956 (hereinafter called the "Act"), requesting a certificate of convenience and necessity to continue the generation, transmission and distribution of electric power to and for the public for com-

pensation within portions of twenty-three (23) counties situated in the Southeastern portion of the State of Mississippi.

2. On March 21, 1957, protests of East Mississippi Electric Power Association, Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, and Coast Electric Power Association were filed in which were incorporated special demurrers, pleas and motions to strike.

3. On April 29, 1957, Applicant filed a motion to strike the aforesaid protests and objections of East Mississippi Electric Power Association, Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, and Coast Electric Power Association.

4. On June 12, 1957, Applicant filed amended motions to strike the aforesaid protests of East Mississippi Electric Power Association, Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, and Coast Electric Power Association.

5. On June 21, 1961, Applicant filed a motion for leave to amend its original application and petition in this cause, together with an amended application and petition, said amendment being attached to said motion.

6. On August 1, 1961, South Mississippi Electric Power Association filed a protest and objection to the motion of Applicant for leave to file an amended petition.

7. On August 1, 1961, Southern Pine Electric Power Association, Dixie Electric Power Association, Pearl River Valley Electric Power Association, Coast Electric Power Association, and Singing River Electric Power Association filed a joint protest and objection to the motion of Applicant for leave to amend the original application and petition and to the attached amendment.

8. On August 1, 1961, East Mississippi Electric Power Association filed separately from the other associations hereinabove mentioned, a response, objection and affirma-

tive plea to motion of Applicant for leave to amend its application and on said date filed a separate protest and objection to the amendment of Applicant to its original application.

9. Thereafter the Commission set the cause for hearing upon several different dates, notice of the time and place of said hearings having been issued and published as provided by law.

10. Thereafter hearings were conducted on March 25, 26 and 27, 1963, and on April 30 and May 1, 1963, on June 3, 1963, and June 19, 1963. During the trial of the proceedings East Mississippi Electric Power Association made a motion to dismiss the entire application.

11. On March 25, 1963, the Commission by order permitted the intervention of Dr. J. U. Morrison of Laurel, Mississippi, in said cause and on April 30, 1963, heard testimony offered by the said Dr. J. U. Morrison in support of his intervention. The said Dr. J. U. Morrison having appeared and having been represented by Honorable Harold Melvin of Laurel, Mississippi.

Applicant appeared on the above dates of hearing and was present by its officers and other employees and was represented by its counsel, Honorable James S. Eaton, of Gulfport, Mississippi, and Honorable Thomas H. Watkins, of Jackson, Mississippi.

The protestant, East Mississippi Electric Power Association appeared on the above dates of hearing and was present by its officers and other employees and was represented by the Honorable R. B. Deen, Jr., of Meridian, Mississippi.

The protestant, Singing River Electric Power Association appeared on the above dates of hearing and was present by its officers and other employees and was represented by the Honorable J. O. Moss of Lucedale, Mississippi, and Honorable T. Harvey Hedgepeth of Jackson, Mississippi.

The protestant, Southern Pine Electric Power Association, appeared on the above dates of hearing and was present by its officers and other employees and was represented by the Honorable John Keyes of Collins, Mississippi, and Honorable T. Harvey Hedgepeth of Jackson, Mississippi.

The protestant, Dixie Electric Power Association, appeared on the above dates of hearing and was present by its officers and other employees and was represented by the Honorable David Welch, Laurel, Mississippi, and Honorable T. Harvey Hedgepeth of Jackson, Mississippi.

The protestant, Coast Electric Power Association, appeared on the above dates of hearing and was present by its officers and other employees and was represented by the Honorable Michael D. Haas of Bay St. Louis, Mississippi, and Honorable T. Harvey Hedgepeth, of Jackson, Mississippi.

The protestant, Pearl River Valley Electric Power Association, appeared on the above dates of hearing and was present by its officers and other employees and was represented by the Honorable T. Harvey Hedgepeth of Jackson, Mississippi, and Honorable Ernest R. Duff of Columbia, Mississippi.

The protestant, South Mississippi Electric Power Association, appeared on the above dates of hearing and was present by its officers and other employees and was represented by the Honorable David Welch of Laurel, Mississippi, and Honorable T. Harvey Hedgepeth of Jackson, Mississippi.

On the aforesaid hearing dates the cause was heard and tried as a controversial case by the Commission on the pleadings filed by the parties thereof on evidence and proof offered by the parties, on exhibits offered by the parties, and upon arguments of counsel for applicant and protestants and intervenor.

The Public Service Commission, after considering all of the pleadings, after hearing all of the evidence and testimony of witnesses offered by the parties, and after carefully examining and studying the exhibits admitted in evidence, and after hearing arguments of counsel for all parties, is of the opinion and hereby finds as follows:

Findings

1. Notice was given to all interested parties and service and process was had in this cause in the manner and for the time as provided for by the Act, and the aforesaid protestants, East Mississippi Electric Power Association,

Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, Coast Electric Power Association, and South Mississippi Electric Power Association, are the only interested parties who have objected in this cause to the issuance by this Commission of the certificate of convenience and necessity requested by the applicant, Mississippi Power Company, in and by its application filed herein on September 26, 1956, and by its amended application filed June 12, 1961. Dr. J. U. Morrison of Laurel, Mississippi, has not been shown by the evidence introduced on his behalf to be an interested party in this cause and the objection asserted by his request to intervene should be overruled and his intervention denied.

2. The Public Service Commission of the State of Mississippi is fully vested with jurisdiction of the parties having an interest in this cause and of the subject matter in this cause.

3. The objection of Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association and Coast Electric Power Association, to leave of Mississippi Power Company to file an amended petition for the purpose of more clearly designating and defining and limiting the geographical areas therein claimed has been withdrawn. The objection of the East Mississippi Electric Power Association and South Mississippi Electric Power Association to motion of Applicant for leave to file an amended application for the aforesaid purposes should be overruled. The motion of East Mississippi Electric Power Association to dismiss the entire application should be overruled.

4. Applicant is a public utility within the meaning of Section 1 (d) (1) of the Act and was in bona fide operation engaged in the business of the generation, transmission and distribution of electric power and in the business of rendering electric service to and for the public for compensation in the territory and areas hereinafter specifically

described on and prior to March 29, 1956, the effective date of the Act, and Applicant has continued to carry on said operations since that date up to and including the present time.

5. The pleadings filed in this cause, the evidence and proof submitted by the applicant, and the exhibits admitted in evidence establish that, pursuant to the provisions of the Act, Applicant is entitled to have issued to it a certificate of convenience and necessity under Section 5 (b) of said Act authorizing and empowering the Applicant to serve the areas of the State of Mississippi hereinafter specifically described, which the Applicant proved it was serving on and prior to March 29, 1956, and which said areas it has continued to serve since that date.

6. The pleadings filed in this cause, the evidence and proof submitted by Applicant, and the exhibits admitted in evidence, establish that Applicant on March 29, 1956, and prior thereto, was pursuant to contracts in effect on said date rendering electric service to East Mississippi Electric Power Association, Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, and Coast Electric Power Association, at the following delivery points:

Coast EPA:

Picayune
Landon
Derby
Bay St. Louis
Biloxi
Boley (N. Picayune)

Pearl River Valley EPA:

Lumberton
Columbia
Hattiesburg
Maxie
Bassfield

Southern Pine EPA:

Bay Springs
Collins
Newton
Rawls Springs

Dixie EPA:

Laurel
Macedonia
Waynesboro (West)
Waynesboro (South)

East Mississippi EPA:	Singing River EPA:
Meridian	McLain
Quitman	Lucedale
	Moss Point
	Ocean Springs
	Richton
	Pascagoula
	Leakesville

Applicant is entitled to have issued to it a certificate of convenience and necessity authorizing and empowering it to render electric service to the aforesaid electric power associations at the aforesaid delivery points.

7. Applicant, on March 29, 1956, and prior thereto, held municipal franchises from the following municipalities in which it distributes electricity to the public for compensation and in which the streets, alleys and other public places are used by the lines or other facilities of Applicant; the municipalities, the date on which said franchises were granted, and the expiration dates thereof, being as follows:

Municipality	Date Granted	Expiration Date
Town of Bassfield	2/ 4/47	2/ 4/72
Town of Bay Springs	1/ 7/47	1/ 7/72
City of Bay St. Louis	2/17/47	2/17/72
City of Biloxi	2/19/47	2/19/72
City of Beaumont	4/17/56	4/17/81
Village of Chunky	1/ 7/47	1/ 7/72
City of Columbia	2/ 6/47	2/ 6/72
Town of Decatur	1/ 7/47	1/ 7/72
City of Ellisville	2/ 4/47	2/ 4/72
Town of Enterprise	2/ 4/47	2/ 4/72
City of Forest	11/ 7/49	11/ 7/74
City of Gulfport	2/ 6/47	2/ 6/72
City of Hattiesburg	2/27/47	2/27/72
Town of Heidelberg	3/ 4/47	3/ 4/72
Town of Hickory	1/ 7/47	1/ 7/72
Town of Lake	1/21/47	1/21/72
City of Laurel	4/21/47	4/21/72
Town of Leakesville	3/ 4/47	3/ 4/72

Municipality	Date Granted	Expiration Date
Town of Lena	3/ 5/47	3/ 5/72
Town of Long Beach	1/ 7/47	1/ 7/72
Town of Louin	2/ 4/47	2/ 4/72
Town of Lucedale	3/ 4/47	3/ 4/72
City of Lumberton	8/ 3/48	8/ 3/73
City of Meridian	5/27/49	5/27/74
Town of Montrose	10/ 5/48	10/ 5/73
City of Moss Point	6/ 3/47	6/ 3/72
Town of Newton	3/20/56	3/20/81
Town of New Augusta	2/16/54	2/16/79
Town of Ocean Springs	1/ 7/47	1/ 7/72
Town of Pachuta	2/11/47	2/11/72
City of Pascagoula	5/30/47	5/30,72
City of Pass Christian	5/ 4/48	5/ 4/73
City of Picayune	5/13/47	5/13/72
Town of Poplarville	11/ 5/46	11/ 5/71
Town of Purvis	1/ 7/47	1/ 7/72
Town of Quitman	12/ 6/49	12/ 6/74
Town of Richton	12/ 3/46	12/ 3/71
Town of Sandersville	1/16/47	1/16/72
Town of Seminary	1/ 7/47	1/ 7/72
Town of Shubuta	3/25/47	3/25/72
Town of Sumrall	12/ 3/46	12/ 3/71
Town of Taylorsville	12/ 5/46	12/ 5/71
Town of Union	12/ 3/46	12/ 3/71
Town of Walnut Grove	3/ 4/47	3/ 4/72
Town of Waveland	5/ 6/47	5/ 6/72
Town of Waynesboro	11/ 5/46	11/ 5/71
Town of Wiggins	11/ 5/46	11/ 5/71

8. The evidence and the proof in this cause establish that Applicant was, on March 20, 1956, granted a franchise by the municipality of Newton and subsequent to March 29, 1956, the voters of the municipality of Newton approved said franchise which expires March 20, 1981, and was granted a franchise by the municipality of Beaumont subsequent to March 29, 1956, which expires April 17, 1981. The Town of Beaumont was initially incorporated as a municipality within 12 months preceding September 29,

1956, and Applicant held a previous franchise in Newton which expired November 14, 1952. Applicant, on and prior to March 29, 1956, rendered electric service to and for the public for compensation in the municipality of Newton and in the area which became initially incorporated into the Town of Beaumont.

9. By the terms of the aforesaid municipal franchises Applicant was authorized to utilize for the location of its facilities in said municipalities, streets, alleys and other public places as the same existed upon the date of the said franchise and as the same might thereafter be laid out or extended during the franchise period. Applicant is, therefore, entitled to have issued to it a certificate of convenience and necessity authorizing and empowering it to serve with electric service the areas within each of the aforesaid municipalities as the same existed on March 29, 1956.

10. Applicant, on and prior to March 29, 1956, operated or had under construction on said date facilities for the generation of electric power in facilities as follows:

> In Lauderdale County, a steam electric generating plant known as Plant Sweatt; in Forrest County, a steam electric generating plant known as Plant Eaton; in Harrison County a steam electric generating plant known as the Gulf Coast Plant.

The Applicant has continued to operate the aforesaid steam electric generating facilities since March 29, 1956, and up to the present time and is entitled to receive a certificate of public convenience and necessity for the continued operation thereof.

11. Applicant on March 29, 1956, owned, operated and had under construction facilities for the transmission of electric power from the aforesaid generating stations and from interconnections between the facilities of said Company and those of Alabama Power Company, at the Alabama-Mississippi State Line, the Mississippi Power and Light Company, at a point between Collins, Mississippi, and Magee, Mississippi, and with the Louisiana Power and Light Company at a point on the Louisiana-Mississippi

State Line, said transmission facilities being at 115,000 volts and extending throughout the 23 counties hereafter mentioned to various sub-stations also owned, operated or under construction by Applicant on March 29, 1956, where said electricity was reduced in voltage to lower voltages either for future transmission or for distribution. Applicant has continued to operate said transmission facilities since March 29, 1956, and up to the present time and is entitled to a certificate of convenience and necessity for the continued operation thereof.

12. On March 29, 1956, Applicant owned, operated and had under construction transmission facilities of 46,000 volts extending from the aforesaid 115,000 volt substations in the State of Mississippi to various municipalities and other load centers where by means of 46,000 volt substations said electricity was reduced in voltage for distribution. The Applicant has continued to operate the aforesaid 46 KV lines and 46 KV substations since March 29, 1956, and up to the present time, and is entitled to a certificate of convenience and necessity for the continued operation thereof.

13. On March 29, 1956, Applicant owned, operated and had under construction electric distribution facilities consisting of poles, wires, transformers, customer service facilities and other equipment by means of which it rendered electric service to customers. It has continued to own, operate and maintain such distribution facilities since March 29, 1956, and up to the present time, and is entitled to a certificate of convenience and necessity for the continued operation thereof.

14. Applicant on March 29, 1956, had and still has a 46,000 to 12,000 volt substation located in the Southwest Quarter of the Southwest Quarter of Section 13, Township 9 North, Range 8 West, Wayne County, Mississippi. From this substation there is a 12,000 volt three-phase electric system serving certain oil producing facilities in an area, hereinafter called for convenience, "Oil Field Area". At various locations along the Applicant's 12,000 volt system, the oil producing companies have metered service points from which they have constructed their own systems to

their own oil wells and other oil field related facilities. The "Oil Field Area" is in Wayne County, Mississippi, and is described as:

> Township Nine North, Range Seven West, Sections Five, Six, Seven, Eight, Seventeen, Eighteen, Nineteen, Twenty, Twenty-nine and Thirty.
>
> Township Nine North, Range Eight West, Sections One, Two, Three, Four, Seven, Eight through Twenty-six.
>
> Township Nine North, Range Nine West, Sections Twelve, Thirteen, and Twenty-four.

Nothing herein shall be construed nor shall it operate to deny to the Applicant the right to continue serving the existing facilities of present customers from these lines and extensions thereto in the area above described, and also to serve any new or additional facilities used in the production, treatment, storage, transportation, or processing of oil and gas, which may be located in the above described area.

The Dixie Electric Power Association has a 12,000/7,200 volt electric system in the same area described above serving residential and commercial customers.

In the above described areas, each utility will continue to serve its existing customers and service to all new customers will be rendered as follows:

A. Applicant shall have the right to serve electric power loads for facilities used in the production, treatment, storage, transportation or processing of oil and gas.

B. The Dixie Electric Power Association shall have the right to serve all residential loads and all commercial electric power loads other than those specified in "A" above.

C. Nothing herein shall be construed or shall operate to deny to either Dixie Electric Power Association or to Applicant the right to apply for a certificate to serve electric loads in said area other than those specified in "A" and "B" above.

15. On March 29, 1956, Applicant was rendering electric service to Pontiac Eastern Corporation in Lamar County, Mississippi, and Pearl River Valley Electric Power Association was rendering electric service to residential customers in said area, which service by Pearl River Valley Electric Power Association was recognized by the order of this Commission in Docket U-94. Pearl River Valley Electric Power Association has the right to continue to serve residential customers in areas known as Pontiac Eastern Corporation Lands in Lamar County, Mississippi, hereafter described, and Applicant has the right to continue rendering electric service to customers of all other classifications in said areas.

16. On March 29, 1956, Southern Pine Electric Power Association was rendering electric service to an area within the corporation limits of the Town of Taylorsville, Mississippi, described as:

> That part of Section Eighteen, Township Ten North, Range Fourteen West, lying South of the Illinois Central Railroad right of way; also all that part of said Section Eighteen lying north of a line extending due west from the center of Central Street as said street crosses the west boundary line of the original town corporate limits; also that part of Section Nineteen, Township Ten North, Range Fourteen West, also the South Half of the Southwest Quarter of the Northwest Quarter of Section Twenty, Township Ten North, Range Fourteen West; also that part of the North Half of the Southwest Quarter of Section Twenty, Township Ten North, Range Fourteen West; also the right for a service line lying and being South of Central Street and running along Forrest Street to serve only the warehouse and facilities of Southern Pine Electric Power Association located on Mayfield Street; all in Smith County, Mississippi.

Said association obtained a franchise from the Town of Taylorsville for the areas described immediately above and its right to continue to serve that area was provided for

by the order of the Commission in Docket U-116. Such right of Southern Pine Electric Power Association to render electric service in the area of Taylorsville described above shall not be exclusive, but the right and authority of Applicant, then holding a municipal franchise from the Town of Taylorsville, covering the whole of the corporation limits of said municipality, to render and continue rendering electric service within the whole of the Town of Taylorsville is hereby specially recognized; and as to the area of Taylorsville for which Southern Pine Electric Power Association holds a franchise from the Town of Taylorsville and a certificate from the Commission in Docket U-116, neither the right of said association nor of Applicant shall be to the exclusion of the other.

17. On and prior to March 29, 1956, under a longstanding voluntary arrangement, Applicant and Singing River Electric Power Association, another electric utility, were each and both serving customers classified as "industrial" in the Standard Industrial Classification Manual, 1957 Edition, issued by the Executive Office of the President of the United States, Bureau of the Budget, in an area in George County, Mississippi, described as follows:

> The Southeast Quarter (SE¼) of Section 19; and that part of Section 29 described as beginning at the Northeast Corner of Section 29, thence run West 1.00 mile to the Northwest corner of said section, thence South .50 miles to the Southwest corner of the Northwest Quarter (NW¼) of said Section 29, thence East .25 miles, thence South .50 miles to the Southwest corner of the Southeast Quarter of the Southwest Quarter (SE¼ of SW¼) of said Section 29, thence East ⅜ths of a mile, thence North along a ⅜ths line to the intersection with the center line of U. S. Highway No. 98 (formerly Mississippi State Highway No. 15), thence Northwesterly along the center line of said highway to the intersection with the West line of East Half (E½) of Section 29, thence North along said West line to a point that is 5/16ths of a mile South of the North line of said Section 29, thence East along a line

that is 5/16ths of a mile South of the North line of said Section .50 miles to the East line of said Section 29, thence North 5/16ths miles to the point of beginning; all in Township 1 South, Range 6 West.

That part of said area located in Section 19 was certificated to Singing River Electric Power Association in Docket No. U-115; and that part of said area located in Section 29 was certificated to Singing River Electric Power Association in Docket No. U-800.

Notwithstanding said area has been certificated to Singing River Electric Power Association, Applicant is entitled to have equal service rights with Singing River Electric Power Association in said area insofar (but only insofar) as consumers of said classification are concerned. Each of said utilities should retain its present consumers of said classification in said area while they are at their present service locations, but as to any new consumers of said classification in said area and any present consumer of said classification in said area whose service location is materially changed but remains therein, the service rights of the two utilities should be concurrent and coequal.

18. Notwithstanding certain parts of Sections 19 and 30, Township 2 North, Range 8 West, Greene County, Mississippi; and certain parts of Sections 13, 14 and 24, Township 2 North, Range 9 West, Perry County, Mississippi, have not heretofore been certificated to Singing River Electric Power Association as service area and will, in this order, be certificated to applicant as service area (being all parts of said sections not now certificated to Singing River Electric Power Association as service area under certificates issued in Causes Nos. U-115 and U-800); nevertheless, in view of a longstanding voluntary service arrangement between Applicant and Singing River Electric Power Association with respect to said parts of said sections, the service rights of Singing River Electric Power Association should be concurrent and coequal with the service rights of Applicant therein insofar, and only insofar, as concerns consumers therein which are classified as "industrial" in the Standard Industrial Classification Manual,

1957 Edition, issued by the Executive Office of the President of the United States, Bureau of the Budget; that each of said utilities should retain its present consumers of said classification therein while they are at their present service locations; but as to any new consumers of said classification therein and any present consumer of said classification therein whose service location is materially changed but remains therein, the service rights of the two utilities should be concurrent and coequal.

19. On March 29, 1956, and continuously since said date, Dixie Electric Power Association was rendering electric service to oil wells and oil well related facilities in the municipality of Sandersville. The right of Dixie Electric Power Association to continue such electric service is hereby recognized.

20. On March 29, 1956, Applicant was offering service and rendering service to industrial consumers and other large power users from its 46 KV and 115 Kv transmission lines and is entitled to a certificate of convenience and necessity for the continued rendition of electric service from such facilities to such users then served. The right of Applicant to request certificates of convenience and necessity by this Commission for the rendering of such service from or along such lines irrespective of whether users be located within or without the geographical areas hereinafter described is likewise hereby recognized.

It Is Therefore Ordered by the Public Service Commission of the State of Mississippi that:

1. The motion of Applicant for leave to amend its application for a certificate of convenience and necessity in this cause be and the same is hereby granted and the application of said company as so amended by the same is hereby approved and granted so as to permit Applicant to continue rendering electric service in the areas of the State of Mississippi hereinafter specifically described.

2. Applicant, a utility as defined in Section 1 D (1) of the Act be and it is hereby granted a certificate of convenience and necessity under Section 5 (b) of the Act to

continue rendering electric service in the areas of the 23 counties in the State of Mississippi, more fully described as follows, to-wit:

(Geographical descriptions omitted.)

3. It Is Further Ordered that Applicant be and it is hereby granted a certificate of convenience and necessity under Section 5 (b) of the Act to continue serving the delivery points to East Mississippi Electric Power Association, Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, and Coast Electric Power Association, hereinabove listed as having been served by said Company on the effective date of the act, irrespective of whether such delivery points be situated within the geographical areas hereinabove described or not.

The Commission is not hereby adjudicating the legal effect of the certificate herein granted as to service to the aforesaid Associations, nor is the Commission determining in this proceeding that the certificate herein granted binds said Associations to continue receiving such service.

4. It Is Further Ordered that Applicant be and it is hereby granted a certificate of convenience and necessity to continue to serve all customers which it was serving on the effective date of the Act and is now serving in accordance with the law, irrespective of whether such customers be situated within the geographical areas above described or not.

5. It Is Further Ordered that Applicant be and it is hereby granted a certificate of convenience and necessity under Section 5(b) of the Act to continue offering its service from or along its transmission lines to industrial areas or other large users of electric service subject to the issuance by this Commission upon application therefor of certificates of convenience and necessity for the rendering of such service where the location thereof is situated outside of the areas hereinabove described.

6. It Is Further Ordered that the service rights of applicant in and to that portion of Wayne County specified in

finding number 14 above; to that portion of Lamar County known as Pontiac Eastern Corporation lands referred to in finding number 15 above; that portion of the Town of Taylorsville described in finding number 16 above; that portion of Sections 29 and 19, Township 1 South, Range 6 West, George County, Mississippi, as specified in finding number 17 above; that portion of Sections 19 and 30, Township 2 North, Range 8 West, Greene County, Mississippi, and Sections 13, 14 and 24, Township 2 North, Range 9 West, Perry County, Mississippi, as referred to in finding number 18 above; and the Town of Sandersville as referred to in finding number 19 above; are hereby granted, subject to the terms, conditions and limitations as hereinabove set forth in said findings.

7. It Is Further Ordered that Applicant be and it is hereby granted a certificate of convenience and necessity to continue the operation and maintenance of all generating facilities as hereinabove described and all transmission facilities and distribution facilities which it was operating on the effective date of the Act irrespective of whether such facilities be situated within the areas hereinabove described or not.

8. The objections of East Mississippi Electric Power Association and South Mississippi Electric Power Association to the motion of Applicant to amend its application are overruled and denied. Likewise, the motion of East Mississippi Electric Power Association, made during the hearing, to dismiss the entire application is overruled and denied.

9. Nothing in this order shall be construed as affecting the right of any electric utility to continue rendering service to any customer being legally served by it upon the effective date of the Public Utilities Act of 1956, except to the extent, if any, of such an express contrary provision herein. The Commission recognizes the existence and effectiveness of various other orders issued by it affecting the service rights of applicant and various other electric utilities, including the objectors herein, and the rights of said

utilities as expressed in said orders are not to be affected by this order.

10. This order shall be and is effective from and after the date of its issuance.

Ordered by the Commission this 18th day of November, 1963.

E. W. ROBINSON,
Executive Secretary.

WHC/et

(8366-7)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 197

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

DAVID C. WELCH
The Gardiner Center Offices
166 Beacon Street
Laurel, Mississippi
T. HARVEY HEDGEPETH
HEDGEPETH, PRICE AND HEDGEPETH
Deposit Guaranty Bank Building
Jackson, Mississippi
Attorneys for Respondent

R. L. MERRIHEW, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1379

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,
Respondent.

No. 43,693 IN THE SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

I. STATEMENT OF THE CASE

On March 7, 1963, the Mississippi Public Service Commission (called Commission) granted unto South Mississipppi Electric Power Association, a respondent herein

(called Respondent), a certificate of public convenience and necessity to construct and operate an electric generation and transmission system consisting of: (a) a 65,000 kilowatt (nameplate rating) generating station to be located in Jones County, Mississippi, and (b) approximately 392.6 miles of 69,000 volt transmission line extending from the generating station into 17 counties in the eastern and southeastern parts of the State.

The initial operation of the system would provide a wholesale supply of electricity at 26 delivery points to four of the nine corporate members of Respondent, to-wit: Dixie Electric Power Association, Laurel, Mississippi (all of its supply); Southern Pine Electric Power Association, Taylorsville, Mississippi (greater part of its supply); Pearl River Valley Electric Power Association, Columbia, Mississippi (all of its supply); and Singing River Electric Power Association, Lucedale, Mississippi (about half of its supply). These associations are electric public utilities which operate distribution systems and serve the public at retail.

These four associations were pursuant to motion of one of the Petitioners in the instant case (Mississippi Power Company) made parties to the proceeding before the Commission as "Respondents" and they of course continued as parties in the role of appellees when the case was appealed to the courts. They are respondents here but for convenience and to avoid confusion they will be referred to herein as the "Distributing Corporations."

Respondent is actually a federation of all of the electric power associations operating in the south half of Mississippi, nine in number, it having been organized in 1941 for the very purpose of providing generation and transmission services for its corporate members but only

four of them will receive power supplies from the initial operation.

Petitioners protested Respondent's application for the certificate before the Commission; appealed from the Commission's Order to the Chancery Court of the First Judicial District of Hinds County (the intermediate court of appeal in such cases); that Court having affirmed, they appealed to the Supreme Court of Mississippi; and, that Court having affirmed, they filed the Petition herein for a Writ of Certiorari.

Copies of the Order of the Commission, the Opinion of the Chancery Court, the Decree of the Chancery Court, the Opinion of the Mississippi Supreme Court and the Judgment of the Mississippi Supreme Court are appended to the Petition herein as Appendices 3, 4, 5, 1, and 2, respectively; therefore are not appended to this brief.

All that is said in this statement of the case is fully shown in the said appendices to the Petition herein.

II. PETITIONERS' STATEMENT OF THE CASE

The statement is fatally defective in respect of petitioners' Questions "B" and "C" (Petition, 3) in that it fails to meet the requirements of *Supreme Court Rule* 23-(f) in these particulars: (a) It does not "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised"; (b) it does not specify "the method of raising them"; (c) it does not specify "the way in which they were passed upon by the Court"; (d) it does not set out "pertinent quotations of specific portions of the Record, or summary thereof, with specific references to the places in the Record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto,

assignment of errors as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

In point of fact, the said alleged federal questions "B" and "C" were not raised in any manner at any stage in any of the State forums.

Petitioners' statement (Petition, 10) that Respondent's tax exemptions (such as it enjoys) are shown by Exhibit 253 is simply not true. That exhibit consists of a large bundle of the work papers of a witness, an engineer, many of them rough and in longhand.

III. THE PARTIES

1. Respondent is a Mississippi corporation organized and operating under the Electric Power Association Act, Chapter 184, *Mississippi Laws of 1936* (Section 5463 et seq., Volume 4A, Recompiled, Mississippi Code of 1942). A copy of that Act as amended is annexed as Appendix No. 1. Respondent has full, plenary and unrestricted statutory and charter authority to carry on all types of electric utility operations—generation, transmission, and other, both within and without municipalities. It is a membership corporation organized and operated on a non-profit basis. It may and does have corporate members; in fact, has no members other than corporate members. Its members are nine electric power associations which are also organized and operate under the Electric Power Association Act but which are engaged in the transmission, distribution, and sale of electricity to the public at retail. They are: Singing River Electric Power Association, Lucedale, Mississippi; Dixie Electric Power Association, Laurel Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi; Coast

Electric Power Association, Bay St. Louis, Mississippi; Magnolia Electric Power Association, McComb, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Capital Electric Power Association, Clinton, Mississippi; and East Mississippi Electric Association, Meridian, Mississippi. It will be observed that the four distributing corporations referred to above are among the members. Respondent has principal headquarters at Laurel, Mississippi. Its charter is in the Record (R. 14, 1549-1555).

2. Petitioner, Mississippi Power Company, is a foreign corporation organized and operating under the laws of the State of Maine but having offices in Gulfport, Mississippi. It carries on a business of generation, transmission, and distribution of electricity in the southeastern part of Mississippi. Its distribution reaches parts of 23 counties. Its scope of corporate powers is assumed for present purposes to be as broad as that of Respondent. Its charter and amendments under the laws of Maine are in the evidence. (R. 34, 4745-4831).

3. Petitioner, Mississippi Power & Light Company, was a foreign corporation organized and operating under the laws of Florida, having offices in Jackson, Mississippi, and carrying on a business of generation, transmission, and distribution of electricity in the western part of Mississippi (has since obtained a Mississippi charter). Its distribution reaches parts of some 46 counties. Its scope of corporate powers is assumed for present purposes to be as broad as that of Respondent. Its charter and amendments under the laws of Florida are in evidence (R. 34, 4833-4883).

4. The four distributing corporations aforesaid are corporations organized and operating under the Electric Power Association Act aforesaid. As such they have full,

plenary and unrestricted statutory and charter authority to carry on all types of electric utility operations—generation, transmission, and other, both within and without municipalities. They are membership corporations, organized and operated on a non-profit basis. The scope of corporate powers of each of these corporations is in all respects equal to those of Respondent and the Petitioners. The charters of these four corporations, in this order, Singing River, Dixie, Pearl River Valley and Southern Pine are in the evidence (R. 33, 4672-4689; R. 33, 4691-4704; R. 33, 4706-4719; and R. 34, 4721-4743), respectively.

5. Respondent, Petitioners, and the distributing corporations are each and all "public utilities" under the Public Utility Act of 1956 (Chapter 372, *Mississippi Laws of 1956;* Section 7716-01, et seq., Volume 6, Recompiled, *Mississippi Code* of 1942) herein called the "Public Utility Act," a copy of which appears as Appendix No. 6 to the Petition herein.

IV. ARGUMENT

1. Due Process

There has been no denial of due process because: (a) the grant of so-called "grandfather" rights under Section 5(b) of the Public Utility Act as implemented by the grandfather certificates issued by the Commission to the Petitioners, respectively, gave Petitioners no more than the right to continue to operate facilities and sell and deliver bulk power at wholesale to the distributing corporations so long as those corporations desired to continue purchasing power at wholesale from Petitioners at such delivery points and the public convenience and necessity was subserved thereby; (b) the provisions of Section 5(f) of the Public Utility Act have no application to the sale of bulk power at wholesale by one electric utility

to another electric utility, but only to service to the public within a utility's certificated service area; (c) the distributing corporations are public utilities of equal legal status with Petitioners and have full authority under the statutes under which they are chartered and operate to generate and transmit their own power supply; and (d) Respondent being simply a federation of nine electric power associations (of which the distributing corporations are four) organized for the purpose of generating and transmitting power for distribution and sale through their respective systems, that is precisely what the distributing corporations are to do—generate and transmit their own power supply.

The State Supreme Court has held that the foregoing is the meaning of the State statutes involved as applied to the facts of the instant case, and this court will accept the State Court's interpretation of State statutes. In its opinion handed down February 14, 1966 (unofficially reported in 183 So. 2d 163), that Court said:

> "The protestants further contend that the order of the commission was erroneous in that it impaired valuable rights existing in them by virtue if the 'grandfather' certificates they hold which authorize them to sell electric energy to the power associations. They cite Capital Electric Power Ass'n v. Mississippi Power & Light Co., 240 Miss. 139, 150, 125 So. 2d 739, 743 (1961) wherein we held:
>
> "'Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable one.'
>
> "The certificates of the protestants authorize the sale

of electricity to specified delivery points. The certificate of Mississippi Power Company is restricted by the following language of the commission:

> "'The commission is not hereby adjudicating the legal effect of the certificate herein granted as to service to the aforesaid associations, nor is the commission determining in this proceeding that the certificate herein granted binds said asociations, to continue receiving such service.'

"'There can be no doubt the protestants will be affected to some degree by the certificate granted to the petitioner as .32% of Mississippi Power & Light Company's 1960 business stemmed from its sales to the associations and 4.14% of the business of Mississippi Power Company from its sales for the same period. The generating facilities of the petitioner will supplant these sales to the associations. It is well to keep in mind that petitioner is a federation of nine power associations, respondents being four of them, so *in essence* petitioner is a corporation through which *the associations will generate their own power as they have the statutory right to do under the Electric Power Association Act,* Chapter 184, Mississippi Laws of 1936, Mississippi Code Annotated section 5463 et seq. (1956). The issue thus restricts itself to *this narrow question*: Do the protestants by their certificated rights to sell, which we have held to be valuable, acquire by the certificates the absolute right to continue these sales to a utility which desires to generate its own electricity and which has a statutory right so to do? An affirmative answer to this question would indeed render the petitioners captive customers of the protestants who are in reality their competitors. We find no comfort in the authorities cited by counsel nor were we able to find direct authorities by our own research to answer this perplexing question. We turn again to the commission's finding and order as to the results we should reach. It found:

"'For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow. The need for more generating capacity is greater than the capacity of the facilities which the petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective groups * * *'

"In candor we should state that the commission has not found the services of either of the protestants to be inadequate, but rather found, as noted, there was a need for additional generating capacity broad enough to encompass the 65-megawatt generating facility authorized. Under these circumstances (a deficit of generating capacity) we are of the opinion that the commission *properly held* the *needs of the public* above the grandfather certificates of the protestants as we are of the opinion that it was *not the legislative intent that a prandfather certificate under Section 7716-05(b) was to supersede the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, which authorized the associations to generate their own energy.* The so-called 'franchise' doctrine, referred to in the Elton case for example, does not apply to the issuance of a certificate of convenience and necessity for a wholesale electric transmission line. Such a certificate is a privilege, regulated and controlled by the state within due process limitations. The idea that a franchise or charter granted by the state may be immutable and unamendable by the state was finally and effectively eliminated by the 1890 Constitution. Mississippi Constitution 1890 §§ 178, 179, 180, 181, 182; cf. Southern Bell Tel. & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). In reaching this conclusion we note that the loss of sales by the protestants, though not insignificant, is not total as the energy may be diverted to their own needs for which there is ample demand.

"Protestants contend further, however, that under the provisions of Section 7716-05(f) they are entitled to the particulars of any inadequacy of service, either under the 'existing facility' or 'valuable franchise' rule, and that they must be afforded a reasonable time by the commission to correct such inadequacy. This statute provides:

> "'(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any *area* covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the *area* affected, may be revoked and cancelled by the commission. (Emphasis ours.)'

"Protestants urge that since the petitioner did not directly follow the statutory remedy for inadequacy, that, in effect, the petition under Section 7716-05(c) (certificate of public convenience and necessity) is a collateral attack upon their valuable franchise rights and they are deprived of due process thereby. We are of the opinion this contention is not well taken as the *statute refers to a specific service area* and *not* to a *facility* (delivery point) *as here,* and there is no finding that the protestants are not rendering 'reasonably adequate service', and by the plain terms of the statute the remedial provisions thereof are not applicable until there be such finding. We conclude that this assignment of error is not well taken and that the

protestants' constitutional rights were not violated by the order of the commission in this proceeding.

> "The electric power associations are products of legislative enactment. They are privileged to use the powers granted in such enactment and are of course subject to its limitations. As such they have legal *status comparable to other utilities* without this Court's opinion as to the underlying philosophy of the act." (Emphasis ours except where shown to be by the Court.)

The rule referred to by the Court as the "existing facility" or "valuable franchise" rule was one adopted by the Court many years ago in respect to the operations of public carriers, and it was in effect written into the Public Utility Act as Section 5 [f] thereof. As the Court said in *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So. 2d 739, 1961 [referred to at one point in the quotation above as the "Elton Case"]:

> "The (Public Utility) Act, by its own terms, adopts as applicable to electric utilities the generally established rule in this state as to the other public utilities: An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5 (c) and (f) makes this clear. Hence the rule in the case as involving common carriers applies in this respect."

Inasmuch as the grandfather certificates issued to Petitioners under the Public Utility Act (1956) did not impair the authority of the distributing corporations (through Respondent) to generate and transmit their own power supply under the Electric Power Association Act (1936); and the "existing facility" or "valuable franchise" rule has

no application to generation of transmission nor to wholesale transactions between or amongst utilities but only to service to the public in certificated service areas; there was no violation of due process in the form of impairment of the certificated rights of Petitioners or otherwise when the Commission found from the evidence that the public convenience and necessity required that the distributing corporations (through Respondent) generate and transmit their own power supplies; and certainly none when the State Courts found that the Commission's Order was supported by substantial evidence and affirmed it.

No Mississippi case cited by Petitioners involved generation and transmission or wholesale transactions between utilities; all involved disputes over the right to render service to the *public* within a *certificated service area.* In such a case the certificate holder's right to serve is exclusive unless it fails or refuses to provide reasonably adequate service; but no such case is presented here.

(Petitioners' cases from other jurisdictions are equally irrelevant, as will be shown later herein.)

Prior to enactment of the Public Utility Act, Petitioners did not have the right to provide a wholesale supply of power to the distributing corporations as "captive customers . . . who are in reality their competitors" (this case, 183 So. 2d at 170) for an indefinite period of time or for any period at all; our State Court of last resort has held that the grandfather clause of the Public Utility Act as implemented by the grandfather certificates did not grant them such a right; therefore, when the public convenience and necessity required that the distributing corporations generate and transmit their own power supply, there was no legal barrier to the Commission's authorizing them to do so.

Petitioners seek to obtain the benefits of the existing facilities or valuable franchise rule upon the assumption that they are "public utilities" and the distributing corporations are "the public" and deliveries of power by them to the corporations although in bulk at wholesale is "service" to the public.[1] The assumption is manifestly erroneous. The distributing corporations have exactly the same legal status as public utilities, both as to rights and responsibilities, as do Petitioners. As said by our State Supreme Court in this case (183 So. 2d at 171), ". . . they have legal status comparable to other utilities. . . ."

Petitioners assert (Petition, 14), "It is reflected in the Record . . ." that they have since receiving grandfather certificates expended "large sums of money" with the view to continuing to supply power at wholesale to the distributing corporations. But this point fails entirely for two reasons: First, Petitioners do not cite a place in the Record where such is shown and could not do so for there is none; and, second, if they assumed that they had a continuing right, such as that afforded by the existing facility or valuable franchise rule, and expended sums of money upon that assumption, they acted upon an erroneous assumption of law and did not gain any rights in doing so.

As was said by the Court of Appeals, Fifth Circuit, in *REA* v. *Central Louisiana Elec. Co.*, 354 F. 2d 859 (5th Cir. 1966), in response to a similar point made in that case by the commercial power companies of Louisiana:

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1. Example, Petition, page 15: "Due process of law would have required that such property rights could not be cancelled or divested unless and until it had been shown that the Petitioners were not rendering satisfactory or adequate *public service* thereunder." (Emphasis ours).

"Appellees have no doubt known all along that they did not hold exclusive franchises. Since 1936 they have known of the Rural Electrification Administration, its powers and purposes. They have made investments and conducted operations in an awareness that the Rural Electrification Administration was in business, with power to make a loan to someone to finance the construction of generators and transmission facilities. The appellees have been and are now doing business with cooperatives established and financed under the REA Act. The record shows no intention or attempt to abrogate *existing contracts* between the parties. Appellees do not have a Constitutionally guaranteed, unrestricted privilege to engage in business free of competition. Cf. Nebbia v. People of State of New York, 291 U.S. 502, at 527, 54 S. Ct. 505, 78 L.Ed. 940.

"Does the case raise anything more (in the words of Dillon) than 'mere economic competition made possible by governmental action'? We think not.

"Without repeating what has already been said, the proof simply shows that whereas the companies have heretofore been the sole occupants of this particular territory, they are to be replaced at some date in the future by a competitor financed under a Federal statute now nearly thirty years old. They are to completely lose customers which heretofore they alone had, but *this is not an unusual product of competition.*

"Under the rule of Pennsylvania Railroad Company v. Dillon, supra, this eliminates from consideration the allegation of illegal acts by the REA Administrator."

The "cooperatives established and financed under the REA Act" referred to by the Court were corporate members of the generation and transmission cooperative in Louisiana to which the REA loan had been made just as the distributing corporations here are the corporate members of the generation and transmission cooperative in Mississippi to

which the loan was made. Of course, in neither instance were the cooperatives "established" under the REA Act, they being in both instances chartered under State law, but they were in both instances "financed under the REA Act."

The authorities from jurisdictions other than Mississippi cited by Petitioners on this question are in nowise applicable. They will be briefly noticed as follows:

Owensboro v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913). This old decision by a divided court (5 to 4) arose out of a situation where in 1889 the City of Owensboro, Kentucky, by ordinance, granted to Cumberland Telephone & Telegraph Company the privilege of erecting "any number" of poles upon the streets of the city for the operation of its business free of charge (no time limitation); the company at once erected a large plant to operate throughout the city involving a large investment and was so operating; in 1909 the city adopted an ordinance giving the company the alternative of (a) removing all of its facilities from the streets, alleys, and public places of the city "within a reasonable time," or (b) purchasing from the city a franchise at a negotiated price.

It was held that the "offer" by the city of the free use of the streets without time limitation and without any reserved right in the city to alter, amend, or repeal the ordinance by which the offer was made had been duly "accepted" by the company by means of the building of its plant and operating the same throughout the city over the years; thus, a contract had ripened between the parties which would be protected under the contract clause of the Federal Constitution.

Detroit v. *Detroit Citizens St. Ry.*, 184 U.S. 368 (1902). Pursuant to express statutory authority, the city entered into a contract with the utility *inter alia* fixing the maxi-

mum fares which the utility might charge passengers for a fixed term of years. Thereupon millions of dollars were expended in the construction of transportation facilities and the purchase of transportation equipment, and the operation was conducted in the city in accordance with the franchise with fares being charged in accordance with the agreement. Before the term expired, the city assumed to pass ordinances (under provisions in the prior ordinances reserving rights in the city to regulate the operation which the city supposed included authority to reduce fares) reducing the fare schedule. Suit for injunction was instituted to restrain the city from enforcing such ordinances. It was held that the contract fixing fares for a term of years was fully authorized by statute; that the reservations of rights to adopt other ordinances for the regulation of the utility's operations were not intended to and did not include authority to reduce the fares which had been agreed upon; and that therefore a contract existed which would be protected under the contract clause of the Federal Constitution.

Boise Artesian Hot & Cold Water v. *Boise City*, 230 U.S. 84 (1913). In 1889, the city granted a non-exclusive easement in perpetuity to two individuals to "lay and repair pipes" in the streets for the operation of their water works in supplying water in the city. In 1890 it granted a similar easement to a corporation engaged in the same type operation. Both grantees immediately accepted the easements, built systems, and rendered service. Both systems were later conveyed to Boise Artesian Hot & Cold Water Company. That company continued to add to the combined systems and provide a water supply service throughout the city. Later still, the city repented of having granted free easements in perpetuity and adopted an ordinance attempting to levy a rental of $300 per month upon the utility for "use and occupancy of the streets and alleys"

of the city. The question presented was as to the validity of the ordinance levying the charge. It was held that, the easements having been "accepted" and acted upon in good faith, and the city having been fully empowered to grant them, contracts had ripened which would be protected under the contract clause of the Federal Constitution.

It is apparent that none of these cases is applicable in the instant case. They apply an old and familiar principle, but that principle is not involved here. Here there can be no question but that prior to enactment of the Public Utility Act (1956), Petitioners had no vested right whatsoever to continue for any given period of time the sales of bulk power at wholesale to their sister utilities, the distributing corporations; our State Court of last resort has expressly held that the Public Utility Act, as implemented by the grandfather certificates issued to Petitioners, did not grant to them any such right; thus it is manifest that they have never had and do not now have any such right. There was therefore no contract clause barrier to the Commission's authorizing the distributing corporations to generate and transmit their own power supplies upon the factual determination by the Commission that the public convenience and necessity required that this be done.

This Court accepts the interpretation of a state court of last resort as to the meaning of a state statute. The Supreme Court of Mississippi is the Court of last resort in this State. MISS. CONST., art. 6, §§ 144, 146; MISS. CODE ANN., §§ 1941-1993 (1956). As has been shown hereinabove, that Court has explicitly held in this case (183 So. 2d at 170-171) that the Electric Power Association Act (1936) authorized the distributing corporations to generate and transmit (through Respondent) their own power

supplies; that the Public Utility Act (1956) as implemented by grandfather certificates issued thereunder to Petitioners, did not diminish that authority; and that there is no conflict in the two statutes in this respect. To repeat for emphasis a brief excerpt from a quotation set out above, the Court said:

> "Under these circumstances (a deficit of generating capacity) we are of the opinion that the Commission properly held the needs of the public above the grandfather certificates of the protestants as we are of the opinion that it was *not the legislative intent* that a grandfather certificate under Section 7716-05(b) was to supersede the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, which *authorized the associations to generate their own energy.*" (Emphasis ours).

In 3 *Cyc. Fed. P.*, § 6.14 (3d ed.), it is said:

> "State decisions construing state statutes and municipal ordinances are to be followed as the rule of decision in federal courts. The same rule applies to the construction of state constitutions, and it also applies to the interpretation of state administrative orders under authority of state statutes."

In *Albertson* v. *Millard,* 345 U.S. 242 (1953), there was an appeal by plaintiffs from a judgment of the United States District Court for the Eastern District of Michigan holding that the Michigan Communist Control Bill was constitutional. This court held:

> "The construction given to a state statute by the state courts is binding upon the federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.

> "There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state grounds. That action is being held in abeyance pending our mandate and decision in this case.
>
> "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action (Citing cases).
>
> "The judgment is vacated and the cause remanded to the District Court. . . ."

In *United States* v. *Burnison*, 339 U.S. 87 (1950), two appeals were combined for decision and they involved the power of the California Supreme Court to declare invalid testamentary dispositions to the United States by two California residents. This Court said:

> "The California Court construed Section 27 of the California Probate Code to prevent a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations. The court arrived at this interpretation despite the contention of the United States that it would raise serious constitutional questions. The construction of the California Code by the California Supreme Court is, of course, binding on us. It leaves us, however, with the federal constitutional questions that the United States urged the California Court to avoid."

Accord: *Shuttlesworth* v. *Birmingham*, 86 S. Ct. 211 (1965); *Cramp* v. *Bd. of Public Instruction*, 368 U.S. 278 (1961); *Clay* v. *Sun Ins. Office*, 363 U.S. 207 (1960); *Kingsley Corp.* v. *Regents of U. of N. Y.*, 360 U.S. 684 (1959); and *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959).

It is therefore submitted that the Public Utility Act of Mississippi, as construed and applied by the Supreme Court of Mississippi, does not deprive Petitioners of prop-

erty rights without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

2. Equal Protection of Laws

Petitioners' Question "B" (Petition, 3), as to whether the State has denied to Petitioners the equal protection of its laws because Respondent enjoys certain tax exemptions under State law not accorded to Petitioners may not be considered by this Court because it was not presented to or considered by the forum of first instance (Commission), the intermediate court of appeal (Chancery Court) or the Court of last resort (Supreme Court) of the State. The question was not even presented in either of the suggestions of error (petitions for re-hearing) separately filed by the Petitioners in the Supreme Court of Mississippi.

> Note: Upon motion of Petitioners and over vigorous objection of Respondent, the Supreme Court of Mississippi permitted the original record in that Court to be certified and filed in this Court in lieu of the transcribe required by Rule 21 of this Court. Therefore, Respondent, not having access to the record except by making a trip to Washington, is unable to cite the volume and page where various pleadings, etc., of Petitioners (protests, motions, assignments of error, etc.) may be found so that the Court might examine them and confirm that the said question was not raised or considered in any state forum, but such is not needful because: (1) Rule 23(f) places the burden upon Petitioners of setting out specific data with respect to any question sought to be reviewed in this court and failure to do so is fatal; (2) Respondent has no duty to aid Petitioners in this behalf; and (3) where Petitioners fail to carry this burden the court will not, with or without the aid of Respondent, sift the record (this one being more than 12,000 pages in 82 volumes) in search of a reviewable federal question for the benefit of Petitioners.

For convenient reference, *Supreme Court Rule* 23(f) is quoted at this point:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised *so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis added).

That the question may not be presented and considered in this Court for the first time is well established. *Beck* v. *Washington*, 369 U.S. 541 (1962).

Texts in accord: 54 Am. Jur., *United States Courts*, § 216 (1962); 36 C.J.S., *Federal Courts*, § 274 (1) (1960).

In the Beck case, this Court said:

> "Secondly, it is said that the Washington statute permitting persons in custody to challenge grand jurors, Revised Code of Washington § 10.28.030, denies equal protection to persons not in custody who are investigated by grand juries. This point is not properly before this court. Although both opinions of the Washington Supreme Court discuss the *interpretation of* §10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute. . .

". . . Nor was the equal protection contention made at all in the petitions for rehearing filed after the Supreme Court had agreed with the lower court's interpretation of the statute to exclude petitioner. Assuming arguendo that for the purposes of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided by the Washington Supreme Court, the argument cannot be entertained here under an unbroken line of precedent. *E.g., Ferguson v. Georgia, 365 U.S. 570, 572, 5 L.ed. 2d 783, 785, 81 S. Ct. 756 (1961); Capital City Dairy Co. v. Ohio, 183 U.S. 238, 248, 46 L.ed. 171, 176, 22 S. Ct. 120 (1902)." (Emphasis by the Court).

In addition to cases cited by the court in the above quotation, see also *Old Jordan Mining and Milling Co.* v. *Societe Anonyme Des Mines De Lexington,* 164 U.S. 260 (1896) which is in accord.

In accord by analogy as cases going up from Federal Courts: *Giacoma Reina* v. *United States,* 364 U.S. 507 (1960); *Pollard* v. *United States,* 352 U.S. 354 (1957); *De Sylva* v. *Ballentine,* 351 U.S. 570 (1956); *McCullough* v. *Kammerer Corp.,* 323 U.S. 327 (1944); *Zellerbach Paper Co.* v. *Helvering,* 293 U.S. 172 (1934); *Duignan* v. *United States,* 274 U.S. 196 (1927).

In the *Beck* case, supra, the court took special notice of the fact that the constitutional attack had not been properly submitted to the trial court; that the Washington Supreme Court refused to recognize issues not properly presented in the trial court; that the petitioner had failed to present his constitutional objection before the Washington Supreme Court, which was bound by Rule 43 of the Rules of Appeal, Revised Code of Washington, to refuse to consider alleged error not contained in the assignments of error; that the Washington Supreme Court

refused to sift through briefs to determine what could have been included within assignments of error; and that the Washington Supreme Court deemed an error not urged in the brief as abandoned. Finally, the court observed that the purported constitutional defense was not urged in the petition for rehearing filed with the Washington Supreme Court. All of the foregoing is directly parallel to the case at hand and to applicable law and rules of court as they obtain in the State of Mississippi.

The Petitioners had waived and abandoned any right to raise the purported federal question sought to be reviewed long before filing their petition for writ of certiorari and even before reaching the Mississippi Supreme Court. It is well established that the Mississippi Supreme Court has limited jurisdiction as a court of appeals and therefore has no jurisdiction to consider an issue that has not been previously presented and duly considered and adjudicated by a trial court. MISS. CONST., art. 6, § 146; MISS. CODE ANN., § 1945 (1956). For this reason, petitioners were required to make proper presentation of the purported federal question to the trial forum and to the intermediate court of appeal (Chancery Court) and, having failed to do so, petitioners were deemed to have abandoned and waived their purported federal question even before reaching the Mississippi Supreme Court.

The fact that an issue not presented to the intermediate court of appeal cannot be presented for the first time before the Mississippi Supreme Court has been recognized by a long line of cases, including *State* v. *Carraway*, 160 Miss. 263, 134 So. 846 (1931), which held that:

> "In the present case there were no assignments of error filed in the circuit court raising the other questions, and none can be noticed on the appeal here. This court only reviews matters presented to the court below."

Accord: *Coleman* v. *Gordon*, 16 So. 340 (Miss. 1894); *Matthews* v. *Cotten*, 83 Miss. 472, 35 So. 937 (1904); *Gulf, Mobile & Northern Ry.* v. *Hardy*, 151 Miss. 211, 117 So. 536 (1928); *Merrill Engineering Co.* v. *Bolton & Carr*, 119 So. 354 (Miss. 1928); *Reynolds* v. *Century Life Ins. Co.*, 155 Miss. 890, 125 So. 99 (1929); *Lott* v. *Watkins*, 162 Miss. 507, 137 So. 895 (1931); and *Richardson* v. *Flowers*, 194 Miss. 105, 11 So. 2d 808 (1943).

Thus, petitioners effectively waived and abandoned their purported federal question before the state courts and, having done so, they have effectively waived and abandoned any right to obtain review of the same here, under the rules and decisions of this Court.

If the issue had been before the State tribunals, there would have been no difficulty whatever in establishing sound bases for such tax exemptions as Respondent enjoys. It does not have total tax exemption by any means. Even Section 9700, MISS. CODE ANN. (Supp. 1964), quoted on pages 4 and 5 of the Petition has been revised by Senate Bill 1693 of the 1966 session of the Mississippi Legislature, approved by the Governor, April 13, 1966, to remove certain of the exemptions. Thus, Petitioners' quotation of the section in their petition filed herein June 3, 1966, is erroneous, but since the question cannot be considered, no need is perceived for annexing as an appendix hereto a copy of Senate Bill 1693.

Petitioners virtually concede that if the distributing corporations were operating the generating and transmission facilities to provide their own power supplies such tax exemptions as electric power associations enjoy would be justified by the "objective of promoting the use and development of electric service in rural areas" (Petition, 17); and the State Supreme Court has held that the gen-

eration and transmission operation by Respondent for the benefit of the distributing corporations is precisely that,—the distributing corporations generating and transmitting their own power supply:

> "It is well to keep in mind that Petitioner (South Mississippi Electric Power Association) is a federation of nine power associations, Respondents (the distributing corporations) being four of them, so in essence Petitioner is a corporation through which the associations will generate their own power as they have the statutory right to do under the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, Mississippi Code Annotated, Section 5463, et seq. (1956)." (183 So. 2d at 170).

Under Petitioners' own authorities, if they had a grievance concerning unequal taxation, their remedy would be a suit against the taxing authority to enjoin collection and declare the tax unlawful. They could not simply submit to the tax and collaterally plead the handicap to keep competitors out of the field. *Hillsboro Township* v. *Cromwell,* 326 U.S. 620 (1946); *Puget Sound Power & Light Co.* v. *Seattle,* 291 U.S. 619 (1934); and *Royster Guano Co.* v. *Virginia,* 253 U.S. 412 (1920).

In any event, it is certain that under what this Court termed "an unbroken line of precedent" (*Beck,* supra), the question may not be considered in the instant case.

Petitioners' authorities would not be relevant if such a question could be considered here; but since the question may not be considered, we forego burdening this brief with discussion of them.

3. Interstate Commerce

Petitioners' Question "C" (Petition, 3) with respect to whether the State has created an undue burden upon interstate commerce may not be considered by the Court

for the very same reasons as are set out hereinabove with respect to their Question "B". The said Question "C" was not presented to or considered by the forum of the first instance (Commission), the intermediate court of appeal (Chancery Court) or the Court of last resort (Supreme Court) of the State. The question was not even presented in either of the suggestions of error (petitions for rehearing) separately filed by Petitioners in the Supreme Court of Mississippi.

To avoid repetition, therefore, all that is said above as to why the court may not consider in the instant case Petitioners' Question "B" is adopted as applying also to their Question "C".

Here again, Petitioners' authorities have been examined and found to have no relevancy, but since the question may not be considered, we forego any discussion of them.

4. Rural Electrification Administration Loan

Petitioners' Question "D" (Petition, 3) apparently seeks to raise the question as to whether Mississippi's Public Utility Act is violative of 7 U.S.C.A., § 904, because the Administrator of Rural Electrification Administration (called REA) has approved a loan to Respondent, the proceeds of which will be used in Respondent's capital requirements. The question is perplexing and standing alone would not be understandable. From the passage of the argument devoted to it (Petition, 21-22), it appears that Petitioners seek to litigate in this case the legality *vel non* of the act of the Administrator of REA in making a loan to Respondent (presumably with the thought that if this source of credit were lost to Petitioner it might not be able to finance its proposed system, and Petitioners would be benefited thereby).

Petitioners may not litigate in this case the legality of the act of the Administrator in making such loan; indeed, they may not litigate that question in any case or court. They lack standing to do so. *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938); *REA* v. *Central Louisiana Elec. Co.,* 354 F. 2d 859 (5th Cir. 1966); *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D.C. Cir. 1955), cert. den., 350 U.S. 884 (1955); *Alabama Power Co.* v. *Alabama Elec. Co-op.,* 249 F. Supp. 855 (M.D. Ala. 1965); *Alabama Elec. Co-op.* v. *Alabama Power Co.,* 176 So. 2d 483 (Ala. 1964), rehearing, 176 So. 2d 483 (Ala. 1965); *Capital Elec. Power Ass'n* v. *Mississippi Power & Light Co.,* 250 Miss. 514, 150 So. 2d 534 (1963); *Delta Elec. Power Ass'n* v. *Mississippi Power & Light Co.,* 250 Miss. 482, 149 So. 2d 504 (1963); *Capital Elec. Power Ass'n* v. *Mississippi Power & Light Co.,* 240 Miss. 139, 125 So. 2d 739 (1961).

In *Alabama Power Co.* v. *Ickes,* supra, Alabama Power Company instituted suit in the U. S. District Court, District of Columbia, to enjoin an officer of the United States from making loans (alleged to be illegal) to Alabama municipalities to construct electric distribution systems, which it was alleged would take business away from Alabama Power Company and virtually put it out of business. It was held that the company had no standing to raise the question of the legality of the loan; the municipalities had authority under *State law* to engage in the distribution business; and in the words of the court: "What Petitioner anticipates, we emphasize, is damage to something it does not possess—namely, a right to be immune from lawful municipal competition."

In the *Kansas City* case, the Court of Appeals followed the *Alabama* case and held that the complaining power companies had no legal standing or litigable in-

terest to challenge the validity of a series of generation and transmission loans (such as is involved in the instant case) by REA to co-operative corporation borrowers.

In the *Alabama Elec. Co-op.* case (in the State court), the Supreme Court of Alabama reviewed the history of cases involving the question beginning with the *Kansas City* case, supra, and said:

> "It has been consistently held that the legality of a loan approved by the Administrator of the REA is not subject to a collateral attack in a hearing before a public service commission or the duly constituted state authority which, in Alabama, is the Director of Finance. Re Southern Maryland Elec. Co-op., Inc., 49 PUR 3d 163; Re Missouri Electric Power Co., 50 PUR (NS) 257; Re Iowa Utilities Co., 47 PUR (NS) 321; State ex rel. Consumers Public Service Co. v. Public Service Commission, 180 S.W. 2d 40; Missouri Power & Light Co. v. Lewis County R.E.C. Ass'n, 149 S.W. 2d 881. In each of these decisions, the question of the violation of the central station service feature of federal act was raised but, in each instance, the decision was in favor of the cooperatives. In view of the authorities cited supra, we feel that we cannot agree with the contention of the appellees that this is a question on which we should pass."

In the case of *Alabama Power Co.* v. *Alabama Elec. Co-op.* (Federal District Court), supra, the question was not raised collaterally as it was in the State Court case and as it is in the instant case but was raised in a bill for injunction filed by Alabama Power Company against the cooperative, Rural Electrification Administration and its Administrator, the United States Department of Agriculture and its Secretary seeking to enjoin the making of a generation and transmission loan exactly similar to the one involved in the instant case. In an able opinion, the learned district judge likewise reviewed the history of cases involving the question and concluded:

> "The law is clear that where prior REA loans have been challenged by plaintiffs occupying essentially the same status as the Alabama Power Company occupies here and for basically the same reasons that the Alabama Power Company advances here, there is no standing to challenge the loans in a judicial proceeding . . . (Citing cases). . . ."

Perhaps the most illuminating case of all on this point is that of *REA v. Central Louisiana Elec. Co.*, supra. Plaintiffs in that case (commercial power companies just as here) sued in the United States District Court for the Western District of Louisiana to enjoin the Administrator of REA from making a loan to Louisiana Electric Cooperatives, Inc. (a federation of rural electric distributing corporations just as here) to construct a generation and transmission system to serve its corporate members. Among the grounds alleged for injunctive relief was the point presently under consideration (the loan allegedly violated 7 U.S.C.A., § 904, because made to serve persons already receiving central station service).

The District Court granted a temporary injunction. The Court of Appeals reversed. The opinion thoroughly explored prior decisions relating to the questions of the standing of the plaintiffs to sue and the authority of the Court to review and held that the plaintiffs had no standing to sue nor did the Court have jurisdiction to review the granting of a loan by the Administrator of REA. In the course of the able Opinion by Judge Coleman, the court said:

> "From the entire history of the Rural Electrification Act and its administration we are totally convinced that Congress has never enacted or intended that loans by this Agency should be reviewable in the courts. The Act itself makes no provision for judicial loan review. By the allegations of the Complaints we

are informed of the thorough manner in which Congress has ridden herd on the REA. Congressional Committees caused the promulgation of REA Bulletin 111-3, which appellees now say has been violated. Certainly, the demands of Congressional Committees do not have the force of law. Congress has seen fit not to enact these particular demands into law, evidently being most content to rely on the deadly sword constantly in its own hands, that is, the sole control of the purse out of which the loans are made. Regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress.

. . .

"Appellees here are not parties to the loan. Appellees are not being *granted* or *denied* a loan in violation of the law or in violation of regulations having the force of law. They are not having any penalty or forfeiture directly assessed against them. They come into court to halt a loan to a third party, contending that the loan is being illegally made and, in the future, will cause illegal consequences. Their only standing for this is their natural opposition to having territory invaded which heretofore has been de facto their sole domain but in which they have no exclusive right.

. . .

"We consider it completely appropriate to say that this Court has approached this case with sincere deference for the findings and views of the able and conscientious Judge who heard it in the first instance. We are nevertheless constrained to the opinion that appellees did not have the requisite standing to bring this action and neither do the Courts have jurisdiction to review the granting or denial of loans by the Rural Electrification Administration. Congress has not conferred such jurisdiction by specific language; Congressional action negates rather than implies an intent to confer such jurisdiction. The Judgment must be reversed." (Emphasis by the Court).

It is manifest therefore that Petitioners have no standing to litigate the legality *vel non* of the loan made by REA to Respondent, not even in a direct attack by way of a bill for injunction; *a fortiori*, not by collateral attack such as is made here.

The Supreme Court of Mississippi decided only as much as was necessary to be decided on the point, namely, that it could not be raised collaterally and was not properly before that Court. The Court said:

> "Finally, protestants contend that the commission's order should be reversed because public convenience and necessity cannot be predicated upon the operation of facilities in violation of law. They urge that public convenience and necessity fails when it is shown without dispute that the terms of the federal statute (Title 7, section 904, U.S.C.A.), and the terms of the loan agreement itself would be violated in that the loan would be used to duplicate existing 'central station service.'
>
> "In the case of Alabama Electric Cooperative v. Alabama Power Co., 278 Ala. 123, 176 So. 2d 483, 487 (1964), the court made the following statement:
>
> > " 'It has been consistently held that the legality of a loan approved by the Administrator of the REA is not subject to a collateral attack in a hearing before a public service commission or the duly constituted state authority which, in Alabama, is the Director of Finance. (Citing cases). In each of these decisions, the question of the violation of the central station service feature of the federal act was raised but, in each instance, the decision was in favor of the cooperatives. In view of the authorities cited supra, we feel that we cannot agree with the contention of appellees that this is a question on which we should pass.'

"Without deciding whether protestants have standing to raise this question we hold, as did the Alabama court, that this question is not a proper one to be raised in this proceeding."

It will be noted that the Court's reference to a showing "without dispute" of a violation of the terms of the loan agreement and of duplication of existing central station service was a statement of a position asserted by protestants (Petitioners here)—not a determination by the Court. Actually, the position asserted by Petitioner there (Respondent here) was that there had been no violation whatever of the loan agreement and no duplication of existing central station service. The court found it unnecessary to resolve the question since it was not properly before the court.

If the legality of the REA loan to Petitioner had been a proper question for determination in the State forums, it would have been readily determined to have been legal and proper in all respects; indeed a very salutary fulfillment of one of the dominant purposes of the RE Act (7 U.S.C.A., Section 904, et seq.). In Section 904, that Act expressly authorizes loans. ". . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service. . . ." It is clear that REA does not *exhaust* its lending powers with the initial loan or loans made to serve persons in rural areas not receiving central station service. The four distributing corporations to be served initially by Respondent (and Respondent's other corporate members for that matter) were initially financed by REA at the distribution level and are still so financed (R. 73, 11056-11163; R. 8, 708; R. 8, 860; R. 10, 978; R. 11, 1056).

The RE Act authorizes further financing from time to time for the service areas of these corporations to heavy up systems or add transmission or generating facilities, or both; and the generation and transmission facilities may be provided by loans to the distributing corporations directly or to a federation of which they are members or to any other eligible borrower—as long as the service reaches the people of these areas through eligible REA borrowers.

It was expressly so held in the *Kansas City* case, supra, when it was heard on the merits in the U. S. District Court for the District of Columbia (115 F. Supp. 402) and this is still good authority even though when the case reached the Court of Appeals this question was not reached, that Court finding that the complaining commercial power companies had no legal standing or litigable interest to challenge the validity of a series of REA generation and transmission loans involved in the case.

In a publication entitled "Public Utilities Fortnightly" published by Public Utilities Reports, Inc. (publishers of PUR), issue of May 9, 1963, there appeared a treatise beginning on page 26 entitled "The Legal Bases for REA Loans," by Louis Gorrin, Director, REA Operations Division, Office of the General Counsel, United States Department of Agriculture, which covers this question fully, including legislative history, in which cases and other authorities are cited. It leaves no doubt that the loan to Respondent came just in the way the Congress contemplated and authorized, that is to say, it was made some time after the initial loans to Respondent's corporate members (distributing corporations) upon the basis of need and to serve the requirements of more than one of the distributing corporations. As pointed out in the treatise, Senator Norris had said during the debates on the bill that a generation and transmission system when

needed and financed would for economic reasons serve more than one distributing corporation, perhaps "a half dozen or a dozen" (80 *Congressional Record* 2756).

The treatise refers to Opinion No. 4981 of the Solicitor, Department of Agriculture, dated May 26, 1944, covering this point, which Opinion has been on file with the Congress for a number of years (in connection with efforts of commercial power companies to induce the Congress to limit the loan-making authority of REA on generation and transmission loans); and may be said to have been accepted as expressive of the original Congressional intent as well as that of the present, nothing having been done to in anywise diminish the Administrator's authority to make such loans as outlined therein despite the repeated efforts of the commercial power companies (including Petitioners) to have that authority limited by Congressional enactment.

A copy of the treatise is annexed as Appendix 2, and a copy of the Solicitor's Opinion is annexed as Appendix 3.

Petitioners cite but one case on this proposition, to-wit: *Puente de Reynosa* v. *City of McAllen*, 357 F. 2d 43 (C.A.5 1966). The case is not in point. There Puente de Reynosa owned the Mexican end and McAllen owned the American end of an international bridge over the Rio Grande River; McAllen and another concessionarie of the Republic of Mexico commenced construction of another and more modern bridge across the Rio Grande fifty-one feet away, the operation of which would be certain to severely injure if not destroy entirely the value of Puente de Reynosa's interest in the old bridge (both were toll bridges). Puente de Reynosa sued in the U. S. District Court to enjoin McAllen alleging that special permission of the Congress of the United States was required to

build the proposed new bridge but was not obtained, therefore, if McAllen were permitted to complete and operate the bridge, it would by means of operating a business in violation of law destroy Puente de Reynosa's property. The Court held that in those circumstances Puente de Reynosa had standing to sue.

If Respondent builds and operates its generation and transmission system to supply power previously supplied by Petitioners, Respondent will not thereby be operating a business in violation of law regardless of where it obtains financing. Moreover, Puente de Raynosa *owned* the Mexican half of the bridge and a perpetual franchise from the Republic of Mexico to operate it. Here, Petitioners have certificates which have been held to be effective as to the power supplies involved only so long as the distributing corporations choose to purchase from petitioners and the public convenience and necessity is subserved thereby (this being the meaning of state statutes as determined by the State Court of last resort and therefore their accepted meaning in this Court).

It will be noted that the *Puente de Reynosa* case was decided by the Court of Appeals, Fifth Circuit, February 15, 1966; the same Court which had on January 13, 1966 (rehearing denied February 7, 1966) decided the case of *Rural Electrification Administration et al.* v. *Central Louisiana Elec. Co., Inc., et al.*, supra, holding by an unusually forceful opinion that the commercial power companies in Louisiana had no standing to litigate and the court had no jurisdiction to review the validity *vel non* of a REA loan to a Louisiana generation and transmission cooperative. It is certain that that Court did not intend by the *Puente de Reynosa* case to overrule its decision in the *Rural Electrification* case in which it had just eight days earlier denied a petition for rehearing.

It is respectfully submitted that the Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

DAVID C. WELCH
The Gardiner Center Offices
166 Beacon Street
Laurel, Mississippi

T. HARVEY HEDGEPETH
HEDGEPETH, PRICE AND HEDGEPETH
Deposit Guaranty Bank Building
Jackson, Mississippi

HEDGEPETH, PRICE AND HEDGEPETH
Deposit Guaranty Bank Building
Jackson, Mississippi
Of Counsel

CERTIFICATE OF SERVICE

I, T. Harvey Hedgepeth, one of the attorneys of record for South Mississippi Electric Power Association, a Respondent in the above-styled cause, and a member of the Bar of the Supreme Court of the United States, certify that I have this day served the foregoing brief upon Petitioners and other interested persons in the following manner: by depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, first class postage prepaid, properly addressed to each of the attorneys of record of such parties and other interested persons, to-wit: James S. Eaton, Esquire, 2300 Fourteenth Street, Gulfport, Mississippi, Attorney for Petitioner Mississippi Power Company; Thomas H. Watkins, Esquire, Plaza Building, Jackson, Mississippi, Attorney for Peti-

tioner Mississippi Power Company; Sherwood W. Wise, Esquire, Electric Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power & Light Company; John K. Keyes, Esquire, Collins, Mississippi, Attorney in the court below, and John H. Price, Jr., Esquire, Deposit Guaranty Bank Building, Jackson, Mississippi, Attorney of Record in this Court for Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Association, and Pearl River Valley Electric Power Association, Respondents herein; and Bennett E. Smith, Esquire, Assistant Attorney General of the State of Mississippi, State Office Building, Jackson, Mississippi, Attorney for Mississippi Public Service Commission.

This July 1...., 1966.

T. HARVEY HEDGEPETH

APPENDIX 1

Copy of "Electric Power Association Act" of Mississippi (Chapter 184, Mississippi Laws of 1936, as amended; Section 5463, et seq., Volume 4A. Recompiled, Mississippi Code of 1942)

§ 5463. Short title.

This Act may be cited as the "Electric Power Association Act."

§ 5464. Formation authorized.

Three or more natural persons may, by executing, filing and recording a certificate as hereinafter provided, form a corporation not organized for pecuniary profit for the purpose of promoting and encouraging the fullest possible use of electric energy by making electric energy available at the lowest cost consistent with sound economy and prudent management of the business of such corporations.

§ 5465. Definitions.

The following terms whenever used or referred to in this Act shall have the following meanings, unless a different meaning clearly appears from the context:

(1) "Corporation" shall mean a corporation formed under this Act.

(2) "Bonds" shall mean and include bonds, interim certificates or receipts, notes, debentures and all other evidences of indebtedness, either issued or the payment thereof assumed by the corporation.

(3) "Person" shall mean and include natural persons, firms, associations, corporations, business trusts, partnerships and bodies politic.

(4) "Energy" shall mean and include any and all electric energy no matter how or where generated or produced.

(5) "Acquire" shall mean and include construct, acquire by purchase, lease, devise, gift, or other mode of acquisition.

(6) "System" shall mean and include any plant, works, system, facilities, or properties, or parts thereof, together with all appurtenances thereto, used or useful in connection with the generation, production, transmission or distribution of energy.

(7) "Law" shall mean any Act or Statute, general, special or local of this State.

(8) "Federal agency" shall mean and include the United States of America, the President of the United States of America, Tennessee Valley Authority, the Federal Emergency Administrator of Public Works, the Administrator of the Rural Electrification Administration, and any and all other authorities, agencies and instrumentalities of the United States of America, heretofore or hereafter created.

(9) "Improve" shall mean and include construct, reconstruct, improve, replace, extend, enlarge, alter, better or repair.

(10) "Board" shall mean the board of directors of a corporation formed under this Act.

(11) "Member" shall mean and include each natural person signing the certificate of incorporation of a corporation and each person admitted to membership therein pursuant to law or its by-laws.

(12) "Services" or "service" shall mean the sale or other disposition of energy, electrical appliances, wiring

and equipment at the lowest cost consistent with sound economy, public advantage and the prudent conduct of the business of a corporation.

§ 5466. Certificate of incorporation.

The certificate of incorporation shall state:

(1) The name of the corporation, which name shall include the words "electric power association" and shall be such as to distinguish it from any other corporation organized and existing under the laws of this State.

(2) The location of its principal office and the post-office address thereof.

(3) The maximum number of directors, not less than three.

(4) The names and post-office addresses of the directors who are to manage the affairs of the corporation for the first year of its existence, or until their successors are chosen.

(5) The period of the duration of the corporation, which shall not exceed ninety-nine (99) years.

(6) The terms and conditions upon which persons shall be admitted to membership in the corporation.

The certificate of incorporation may also contain any provisions not contrary to law which the incorporators may choose to insert for the regulation of its business and for the conduct of the affairs of the corporation; and any provisions creating, defining, limiting or regulating the powers of the corporation, its directors and members.

§ 5467. Prohibition on use of words "electric power association."

The words "electric power association" shall not be used in the corporate name of corporations hereafter formed other than those formed pursuant to the provisions of this Act.

§ 5468. Execution and filing of certificate of incorporation.

The natural persons executing the certificate of incorporation shall be residents of the territory in which the principal operations of the corporation are to be conducted, who are desirous of using electric energy to be furnished by the corporation. The certificate of incorporation shall be acknowledged by the subscribers before any officer authorized to take acknowledgments to deeds or other instruments. When so acknowledged, the certificates may be filed with the Secretary of State at any time thereafter within six months of the date of the last acknowledgment. The Secretary of State, upon receipt of such instrument, shall indorse upon it the following:

"Received at the office of the Secretary of State this the ..... day of ....., A.D. ..... together with the sum of $..... deposited to cover the recording fee, and referred to the Attorney-General for his opinion.

Signed .....
Secretary of State"

The Attorney-General shall examine the same and indorse his opinion thereon as follows:

"I have examined this charter of incorporation and am of the opinion that it . . . the Constitution and Laws of this State, or of the United States.

Signed .....
Attorney-General"

The Attorney-General shall without delay refer the same to the Governor for his approval or disapproval. The Governor shall return it to the Secretary of State with his action indorsed thereon. If he approves it, the Secretary of State shall record it in the record kept in his office for that purpose, and certify to the same under the great seal of this State, and transmit it to the applicants; if the Governor disapproves it, the Secretary of State shall file it in his office and notify the applicants of the disapproval and state the reasons therefor. If within thirty days after the Secretary of State has mailed the said notice they have not amended it so as to meet the approval of the Governor, the Secretary of State shall return the fee to the applicants, less the sum of three dollars, which shall be paid into the State Treasury for "charters examined, disallowed and filed." The powers specified in the charter shall, by the approval of the charter, be vested in the corporation and it shall go into operation without further formalities.

§ 5469. Board of directors.

Each corporation formed hereunder shall have a board of directors and the powers of the corporation shall be vested in and exercised by such board of directors. The directors of the corporation, other than those named in its certificate of incorporation, shall be elected annually by the members entitled to vote. The directors must be members and shall not be entitled to compensation for their services as directors but shall be entitled to reimbursement for expenses incurred by them in the performance of their duties. The board shall elect annually from its own number a president and a vice-president.

§ 5470. Powers of board.

The board shall have power to do all things necessary or convenient in conducting the business of a corporation, including, but not limited to:

(1) The power to adopt and amend by-laws for the management and regulation of the affairs of the corporation. The by-laws of a corporation may make provisions, not inconsistent with law or its certificate of incorporation, regulating the admission, withdrawal, suspension or expulsion of members; the transfer of membership, the fees and dues of members and the termination of memberships on nonpayment of dues or otherwise; the numbers, times and manner of choosing, qualifications, terms of office, official designations, powers, duties and compensation of its officers; defining a vacancy in the board or in any office and the manner of filling it; the number of members to constitute a quorum at meetings, the date of the annual meeting and the giving of notice thereof and the holding of special meetings and the giving of notice thereof; the terms and conditions upon which the corporation is to render service to its members, the disposition of the revenues and receipts of the corporation; regular and special meetings of the board and the giving of notice thereof; and such other matters as the board may deem appropriate or desirable.

(2) To appoint agents and employees and to fix their compensation and the compensation of the officers of the corporation.

(3) To execute all instruments.

(4) To delegate to one or more of the directors or to the officers, agents and employees of a corporation such powers and duties as it may deem proper.

(5) To make its own rules and regulations as to its procedure.

(6) To select an executive committee the members of which shall be users of energy supplied by the corporation, and a majority of said members shall be members

of the board of directors, and to delegate to said committee any or all of the powers granted to the board of directors in this Act except that the board shall not delegate its powers to adopt and amend by-laws for the management and regulation of the affairs of the corporation.

§ 5471. Certificate of membership—voting.

A corporation may issue to its members certificates of membership in such form as the by-laws may prescribe. Each member shall be entitled to only one vote on each matter submitted to a vote at the meetings of the members of the corporation, but voting by proxy or by mail may be provided for in the by-laws.

§ 5472. Corporate purposes.

Except as hereinafter provided, the corporate purpose of each corporation formed hereunder shall be to render service to its members only. Any person may become and remain a member if such person shall use energy supplied by such corporation and shall comply with the terms and conditions in respect to membership contained in the by-laws of such corporation, which terms and conditions shall be nondiscriminatory. Any person who shall agree to use energy supplied by the corporation from an existing line or from a line the construction of which has been authorized or commenced by the corporation may be admitted to membership in the corporation prior to such use upon complying with the other terms and conditions with respect to membership contained in the certificate of incorporation or in the by-laws. The membership fee of the corporation shall be fixed by the board of directors. Should the corporation acquire any electric facilities already dedicated or devoted to the public use it may, for the purpose of continuing existing service and avoiding hardship, continue to serve the persons served directly from such fa-

cilities at the times of such acquisition without requiring that such persons become members. In no event shall the number of such nonmembers served exceed forty-nine (49%) per centum of the total number of persons served by the corporation. Such nonmember customers shall have the right to become members upon nondiscriminatory terms. The rates to such nonmembers shall be on a cost basis and may exceed the rates to members by only such amounts as may be necessary to meet the full actual cost of service to such nonmembers.

§ 5473. General grant of powers.

Each corporation formed under this Act is hereby vested with all power necessary or requisite for the accomplishment of its corporate purpose; and no enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, nor to limit any such grant to a power or powers of the same class or classes as those so enumerated.

§ 5474. Enumeration of powers.

A corporation created under the provisions of this Act shall have power to do any and all acts or things necessary or convenient for carrying out the purposes for which it was formed, including, but no limited to:

(1) To sue and be sued.

(2) To have a seal and alter the same at pleasure.

(3) To acquire, hold and dispose of property, real and personal, tangible and intangible, or interests therein and to pay therefor in cash or property or on credit, and to secure and procure payment of all or any part of the purchase price thereof on such terms and conditions as the board shall determine.

(4) To render service and to acquire, own, operate, maintain and improve a system or systems within the State and in counties adjacent thereto.

(5) To pledge all or any part of its revenues and to mortgage or otherwise incumber all or any part of its property for the purpose of securing the payment of the principal of and interest on any of its bonds or other obligations.

(6) To use any right of way, easement or other similar property right necessary or convenient in connection with the acquisition, improvement, operation or maintenance of a system, granted by the State or any political subdivision thereof, provided that the governing body of such political subdivision shall consent to such use; and to have and exercise the power of eminent domain in the manner provided by the condemnation laws of this State for acquiring private property for public use, such right to be paramount except as to the property of the State or any political subdivision thereof.

(7) To accept gifts or grants of money, property, real or personal, from any person, municipality or Federal agency and to accept voluntary and uncompensated services.

(8) To make any and all contracts necessary or convenient for the full exercise of the powers in this Act granted including, but not limited to, contracts with any person, Federal agency or municipality for the purchase or sale of energy and/or the acquisition of all or any part of any system, and in connection with any such contract to stipulate and agree to such covenants, terms and conditions as the board may deem appropriate, including covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, oper-

ation and maintenance practices and the manner of disposing of the revenues of the system operated and maintained by the corporation.

(9) To sell, lease, or otherwise dispose of all or any part of its property, subject however to the provisions of Section 14 [§ 5476, infra] of this Act as amended.

(10) To contract debts, borrow money and to issue, assume or indorse the payment of bonds or other evidences of indebtedness.

(11) To fix, maintain and collect fees, rents, tolls and other charges for services rendered.

(12) To acquire and to sell, lease, distribute and generally to deal in electrical and plumbing appliances, apparatus, machinery and equipment for the purposes of and in connection with the promotion of the sale of electric energy to its customers; to assist its customers to purchase or otherwise obtain such appliances, apparatus, machinery and equipment; to assist its customers to wire their premises and to install therein such appliances, apparatus, machinery and equipment; to acquire and to indorse, sell, pledge, hypothecate and dispose of notes, bonds and other obligations of its customers in carrying out the purposes expressed in this paragraph.

(13) To perform any and all of the foregoing acts and to do any and all of the foregoing things under, through or by means of its own officers, agents and employees, or by contracts with any person, Federal agency or municipality.

(14) To condemn any land, easements, or rights of way, either on, under, or above the ground, as the association may deem necessary for any purposes mentioned in this Act, and such property or interest in such property

may be so acquired whether or not the same is owned or held for public use by corporations, associations or persons having the power of eminent domain, or otherwise held or used for public purposes; and such power of condemnation may be exercised in the mode or method of procedure prescribed by Chapter 26, Code of Mississippi of 1930 [Title 12, ch. 3, Code of 1942], or in the mode or method of procedure prescribed by any other applicable statutory provisions now in force or hereafter enacted for the exercise of the power of eminent domain; provided, however, that where condemnation proceedings become necessary, the judge of the circuit court or the judge of the county court in counties where the county court exists, in which such proceedings are filed, shall, upon application of the authority, and upon the deposit in court, to the use of the person or persons lawfully entitled thereto, of such amount as the judge may deem necessary to assure just compensation, order that the right of possession shall issue immediately or as soon and upon such terms as the judge, in his discretion, may deem just and proper. Upon application of the parties in interest other than the association, the judge may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceedings.

§ 5475. Operations outside of state.

To the extent necessary in the judgment of the board to make effective the powers conferred by this Act, the corporation shall have power to acquire, own, operate, maintain, and/or improve a generating and/or transmission system or systems outside the State of Mississippi.

§ 5476. Sale of property.

No corporation may sell, mortgage, lease or otherwise incumber or dispose of any of its property (other than

(1) property which, in the judgment of the board, is neither necessary nor useful in operating and maintaining the corporation's system and which in any one year shall not exceed ten per centum in value of all the property of the corporation, or (2) merchandise), unless authorized so to do by the votes of at least a majority of its members. During the first year of the existence of a corporation its property shall not be sold or leased, wholly or in part, unless the sale or lease shall be authorized not only by a majority of its members but also by a majority of all persons who have signed customers' survey forms or otherwise signified in writing their intention to become members of the corporation. All such persons shall be deemed to have a beneficial interest in the affairs of the corporation in so far as the sale or lease of the property of the corporation is concerned and the members of the board are hereby declared to be the trustees of such persons with respect thereto.

§ 5477. Issuance of bonds.

A corporation formed hereunder shall have power and is hereby authorized, from time to time, to issue its bonds for any corporate purpose. Said bonds may be authorized by resolution or resolutions of the board, and may bear such date or dates, mature at such time or times, not exceeding forty years from their respective dates, bear interest at such rate or rates not exceeding six per centum per annum, payable semi-annually, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption not exceeding par and accrued interest, as such resolution or resolutions may provide. Such bonds may be issued for money or property at public or private sale, for such price or prices

as the board shall determine, provided that the interest cost to maturity of the property (at its value as determined by such board, the determination of which shall be conclusive), or money received for any issue of said bonds, shall not exceed six per centum per annum, payable semi-annually. Pending the preparation or execution of definite bonds, interim receipts or certificates or temporary bonds may be delivered to the purchaser of said bonds. Any provision of law to the contrary notwithstanding, any bonds and the interest coupons appertaining thereto, if any, issued pursuant to this Act shall possess all of the qualities of negotiable instruments.

§ 5478. Covenants or agreements for security of bonds.

In connection with the issuance of any bonds, a corporation may make covenants or agreements and do any and all acts or things that a business corporation can make or do under the laws of the State in order to secure its obligations notwithstanding any restrictions contained in Section 14 hereof [§ 5476, supra].

§ 5479. Purchase and cancellation of bonds.

A corporation shall have power out of any funds available therefor to purchase any bonds issued by it at a price not exceeding the principal amount thereof and accrued interest thereon. All bonds so purchased shall be canceled.

§ 5480. Consolidation.

Any two or more corporations created under the provisions of this Act may enter into an agreement for the consolidation of such corporations. Such agreement shall set forth the terms and conditions of the consolidation, the name of the proposed consolidated corporation, the number of its directors, not less than three, the time of the annual meeting and election and the name of at least three persons to be directors until the first annual meeting.

If such agreement is approved by the votes of a majority of the members of each corporation, the directors named in the agreement shall subscribe and acknowledge a certificate conforming substantially to the original certificates of incorporation, except that it shall be entitled and indorsed "certificate of consolidation ....." (the blank space being filled in with the names of the corporations being consolidated) and shall state:

(1) The names of the corporations being consolidated.

(2) The name of the consolidated corporation.

(3) The other items required or permitted to be stated in an original certificate of incorporation. Such certificate of consolidation and a certified copy or copies thereof shall be filed in the same places and approved by the same officers as an original certificate of incorporation and thereupon the proposed consolidated corporation, under its designated name, shall be and constitute a body corporate with all the powers of a corporation as originally formed hereunder.

§ 5481. Rates.

A corporation formed hereunder shall have power to charge reasonable fees, rents, tolls, prices and other charges for service rendered which shall be sufficient at all times to pay all operating and maintenance expenses necessary or desirable for the prudent conduct and operation of its business and the principal of an interest on such obligations as the corporation may have issued and/or assumed in the performance of the purpose for which it was formed and the revenues and receipts of a corporation shall first be devoted to such operating and maintenance expenses and to the payment of such principal and interest and thereafter to such reserves for improvement, new construction, depreciation and contingencies as the board may from

time to time prescribe. Revenues and receipts not needed for these purposes shall be returned to the members, by the reimbursement of membership fees, or by way of general rate reductions, as the board may decide.

§ 5482. Dissolution.

Any corporation created hereunder may be dissolved by filing, as hereinafter provided, a certificate which shall be entitled and indorsed "certificate of dissolution of ....." (the blank space being filled in with the name of the corporation) and shall state:

(1) Name of the corporation and, if such corporation is a corporation resulting from a consolidation as herein provided, the names of the original corporations.

(2) The date of filing of the certificate of incorporation and, if such corporation resulting from a consolidation as herein provided, the dates on which the certificates of incorporation of the original corporations were filed.

(3) That the corporation elects to dissolve.

(4) The name and post-office address of each of its directors, and the name, title and post-office address of each of and the name, title and post-office address of each of its officers.

Such certificate shall be subscribed and acknowledged in the same manner as an original certificate of incorporation by the president or vice-president and the secretary or an assistant secretary, who shall make and annex an affidavit stating that they have been authorized to execute and file such certificate by the votes cast in person or by mail by a majority of the members of the corporation entitled to vote.

A certificate of dissolution and a certified copy or copies thereof shall be filed in the same places as an original certificate of incorporation and thereupon the corporation shall be deemed to be dissolved.

Such corporation shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations and collecting or liquidating its assets, and doing all other acts required to adjust and wind up its business and affairs, and may sue and be sued in its corporate name. Any assets remaining after all liabilities or obligations of the corporation have been satisfied or discharged shall be ratably distributed to the members thereof.

§ 5483. Amendment of certificate of incorporation.

A corporation created hereunder may amend its certificate of incorporation to change its corporate name, to increase or reduce the number of its directors or change any other provisions therein; provided, however, that no corporation shall amend its certificate of incorporation to embody therein any purpose, power or provision which would not be authorized if its original certificate including such additional or changed purpose, power or provision were offered for filing at the time a certificate under this section is offered. Such amendment may be accomplished by filing a certificate which shall be entitled and indorsed "certificate of amendment of certificate of incorporation of ..... electric power association," and state:

(1) The name of the corporation, and if it has been changed the name under which it was originally incorporated.

(2) The date of filing the certificate of incorporation in each public office where filed.

(3) The purposes, powers or provisions, if any, to be amended or eliminated and the purposes, powers, or provisions, if any, to be added or substituted. Such certificate shall be subscribed in the same manner as a original certificate of incorporation hereunder by the president or a vice-president and by the secretary or an assistant secretary who shall make [and] annex an affidavit stating that they have been authorized to execute and file such certificate by the votes cast in person or by mail by a majority of the members of the corporation entitled to vote. Such certificate shall be filed in the same places and approved by the same officers as an original certificate of incorporation and thereupon the amendment shall be deemed to have been effected.

§ 5484. Moneys of corporations.

All moneys of a corporation from whatever source derived, shall be deposited in one or more banks or trust companies, and, if the corporation shall so require, each of such accounts shall be continuously secured by a pledge of direct obligations of the United States of America or of the State of Mississippi having an aggregate market value, exclusive of accrued interest, at all times at least equal to the balance on deposit in such account or accounts.

Such securities shall either be deposited with the corporation or held by a trustee or agent satisfactory to the corporation. In lieu of any such pledge or such securities, said deposits may be secured by a surety bond or bonds which shall be in form, sufficiency and substance satisfactory to the corporation.

§ 5485. Chartering existing corporations under this Act.

Any existing corporations under the laws of the State of Mississippi organized for the same general purposes as the corporations provided for by this Act may be chartered

hereunder by filing with the Secretary of State a certificate, approved by a majority of the board of the corporation, signed by the duly authorized officer or officers thereof, and acknowledged by the subscribers before any officer authorized to take acknowledgments to deeds or other instruments. Such certificate shall set forth the information required under Section 4 hereof [§ 5466, supra] for corporations organizing under this Act, shall declare the intention of the corporation to operate under this Act, and shall be filed in the office of the Secretary of State, who shall forthwith cause this certificate to be handled in the manner prescribed in Section 6 hereof [§ 5468, supra] for original certificates of incorporation. The corporation under its existing name shall thereupon have all powers and duties set forth in this Act, but shall relinquish the powers under its former charter; and no debt or other obligation, of or to the corporation, incurred prior to reincorporation under this section, shall be affected thereby. Any act, contract, or covenant heretofore done, made, entered into or performed by any corporation organized under any other Act but reincorporating hereunder, is hereby expressly validated if such act, contract, or covenant would have been valid if done, made, entered into or performed under the terms hereof.

§ 5486. Taxation of corporations.

All corporations and their property shall be liable for taxes and taxed and assessed in the same manner and to the same extent as privately owned utilities.

§ 5487. Construction of Act.

This Act is to be liberally construed and the enumeration of any object, power, manner, method or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods or things.

§ 5488. Separability of provisions.

If any provision of this Act, or the application of such provision to any person, body, or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons, bodies, or circumstances, other than those as to which it shall have been held invalid, shall not be affected thereby.

§ 5489. Act complete in itself.

This Act is complete in itself and shall be controlling. The provisions of any other law, general, special or local, except as provided in this Act, shall not limit or restrict the powers of any corporation formed under this Act.

APPENDIX 2

Treatise on Certain Phases of Federal RE Act Appearing in PUBLIC UTILITIES FORTNIGHTLY Issue of May 9, 1963

THE LEGAL BASES FOR REA LOANS

An answer to critics of REA loan-making policies is provided by an examination of the legal background of the Rural Electrification Act of 1936 and other pronouncements which are the basis for present REA policy making.

By LOUIS GORRIN*

In recent months much of the criticism leveled at certain kinds of Rural Electrification Administration loans has purported to be based at least in part upon legal or quasi-legal grounds. It would be useful, therefore, to set forth briefly the legal foundations for these REA loans

*Director, REA Operations Division, Office of the General Counsel, United States Department of Agriculture.

in order to appraise the validity of the legal aspects of the criticism of REA.

This task is rendered relatively simple because in the various criticisms of REA the same basic legal contentions invariably are repeated. The same items of REA legislative history are utilized. Perhaps, the most succinct presentation of the challenges to REA loans is found in a booklet, issued in August of 1962, by the Edison Electric Institute, entitled "The Deviation of REA." This presentation, by Edwin Vennard, claims that REA has strayed from its allotted path in three major categories of loan making. These are generation and transmission loans, loans for service to industrial loads, and loans for continuing service in areas which have changed from rural (under 1,500 population) to urban.

One clear theme of argument runs through all the criticisms of REA. It is that REA may not finance facilities to serve: (1) The more lucrative loads in REA borrowers' service areas; or (2) certain more densely populated portions of those areas; or (3) the wholesale requirements of REA borrowers theretofore served at wholesale by power companies. These all appear to add up to the basic claim that REA is authorized to finance only that service which the power companies are not interested in having for themselves. The power companies claim, in effect, to have a veto power over cooperative service and REA loans. They appear to assert the right of first refusal.

The common, if not invariable, support for this basic contention is a quotation from a statement made in 1936 by Congressman Rayburn, one of the sponsors of the Rural

Electrification Act, that the REA bill did not intend to finance competition.[1] This use of an isolated fragment of REA legislative history conveys an entirely misleading and inaccurate picture of the legislative history. Ignored are clear legislative pronouncements which conclusively show that the fragment utilized by REA critics could not possibly have the significance they ascribe to it. What is altogether clear, not only from the plain language of the Rural Electrification Act[2] but from its full legislative history, is that the only competition this act prohibits is initial REA-financed substitute service to a consumer already getting central station service.

The REA bill, as originally introduced in 1936, authorized only loans for service to "rural areas" not receiving central station service.[3] Senator Norris' committee reported out the bill with the broadened authority it now has: loans for "persons in rural areas" not receiving service.[4]

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1. The statement by Congressman Rayburn usually quoted is as follows: We are not in this bill intending to go out and compete with anybody. By this bill we hope to bring electricity to people who do not now have it. This bill was not written on the theory that we were going to punish anybody or parallel their lines or enter into competition with them. (80 *Congressional Record* 5283.)

2. The provisions of the Rural Electrification Act of 1936, as amended, relating to the electrification program, are codified in Title 7 of the U.S. Code, §§ 901-915.

3. Section 4 of S 3483, 74th Congress, 2d Session, would have authorized loans "for the purpose of financing the construction of generating plants and electric transmission and distribution lines or systems for the furnishing of electric energy *to rural areas not receiving central station service.*" (Emphasis added)

4. Section 4 of the Rural Electrification Act (7 USC 904) authorizes loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy *to persons in rural areas who are not receiving central station service.*" (Emphasis added)

Senator Norris was specifically asked in the course of the debate whether the act would permit going into an area generally served.[5] His answer could not be clearer. He said, "Not to those already receiving it, but it might come in the ten-mile area and supply farmers who are not receiving it. That is a distinction which I think ought to be drawn."[6] Again, Senator Norris was asked if the co-operatives might enter in competition with power companies. His answer was as follows: "They would not come in competition with farms already supplied. They might come in competition with the central power station."[7]

Intent of Congress

Following these colloquies, an amendment was introduced on the floor which would have limited the present authorization to serve unserved people by the addition of this language: "and for whom such service may not be furnished or made available by competing private enterprise."[8]

REA critics were arguing in 1962 and 1963 as though this limitation were enacted. The fact is that this limitation was overwhelmingly rejected in 1936.[9] Stated otherwise, the contention that REA should not be permitted to finance service where power company service is available was specifically rejected by Congress when the Rural Electrification Act was passed.

It is well to remind ourselves that, in 1936, power company service was from one point of view available to millions of unserved rural people, many of whom were

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5. 80 *Congressional Record* 2752.
6. Ibid.
7. Ibid.
8. 80 *Congressional Record* 3230.
9. 80 *Congressional Record* 3317.

located in areas certified to the power companies. These unserved persons could have had power company service if they could have afforded it and were willing to meet the power companies' financial requirements. It was clear, from the legislative history referred to above, that the act, if it was to get on with the job of rural electrification, had to provide competition with at least that kind of available power company service..

In 1959, after one power company had urged upon the Comptroller General its view that the availability test was relevant, the Aiken Resolution adopted by the Senate again reaffirmed the clear meaning and intent of the Rural Electrification Act. This resolution reads in significant part: "It is the sense of the Senate that the RE Act continue to be interpreted to authorize . . . loans (1) to bring electric service to persons in rural areas if such persons are, in fact, not receiving central station service, and (2) continue to serve those who are presently being served with the aid of funds loaned under the act."[10]

The second part of the Aiken Resolution reaffirms the authorization under the act to make successive loans to continue to take care of the continuing and increasing needs of those initially served through REA financing. This is another reaffirmation of the validity of generating and transmission loans. It recognizes that the providing of service to the act beneficiaries, those originally unserved, is not a one-shot matter. REA loan making is, of necessity, a continuing process.

A Court Opinion

The Rural Electrification Act authorizes loans for generating and transmission facilities, as well as for

10. S Res 21, 86th Congress, 1st Session, adopted August 21, 1959.

distribution, in so many words.[11] In 1944, the solicitor of the Department of Agriculture rendered a basic opinion upholding the legality of these loans.[12] This opinion points out that the act does not limit the making of a generation and transmission loan to the time that an initial distribution loan is made to Rural Electrification Act beneficiaries. To graft such a requirement upon the act would nullify the express power to make generation and transmission loans since it is generally not feasible, either as a matter of economics or engineering, to build such facilities until the distribution facilities are in operation.

Thus, this express lending power, the opinion holds, could be exercised at different stages when it would be most advantageous for the act beneficiaries.[13] This opinion was filed with a congressional committee in 1945.[14] It can fairly be said that this interpretation of the Rural Electrification Act was accepted as consistent with congressional intent and understanding.[15]

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11. Section 4 (7 USC 904) authorizes loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or system."

12. Opinion No. 4981, dated May 26, 1944, from the solicitor, Department of Agriculture, to the Secretary of Agriculture.

13. In the course of debate in the Senate on the REA bill, Senator Norris pointed out that in the typical case where a loan for generating facilities would be advantageous, it would be designed to supply not one distribution system, because the cost would ordinarily be too high, but "half a dozen or a dozen." (80 *Congressional Record* 2756)

14. Hearings, Federal Power Subcommittee of House Committee on Interstate and Foreign Commerce on proposed REA "Planning Act of 1945," 79th Congress, 1st Session (1945), pp. 522 et seq.

15. In its consideration of an REA deficiency appropriation for 1946, the Senate, after extended debate, defeated a proposed amendment (92 *Congressional Record* 1799) requiring certification

In the only court opinion on this issue, the federal district court in the District of Columbia, in 1953, specifically rejected the argument of the plaintiff power company that generation and transmission loans were not authorized because the co-operatives were already receiving wholesale power from the power company and the co-operatives' retail consumers were already getting central station service.[16]

This federal court opinion states:

> . . . The court has not been persuaded that it was intended that rural residents, upon receiving an REA loan, should be barred from further participation in the advantages and opportunities offered in the rural electrification program. Moreover, in the opinion of the court, there is nothing in the language of the act to require that the Administrator's authority to finance the construction of generating plants and transmission facilities must be exercised simultaneously with the power to finance the construction of distribution lines to furnish electric energy to unserved persons in rural areas . . .

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by the Federal Power Commission that there is not sufficient electric current available in the area concerned at reasonable rates before a loan for generating facilities could be made (92 *Congressional Record* 1799-1817). In the course of this debate, a generating loan to a distribution co-operative which had been purchasing its power at wholesale was fully discussed and excerpts were read from correspondence in which the REA Administrator justified the loan by reference to power costs and restrictive provisions in the existing wholesale power contract.

16. Kansas City Power & Light Co. et al. v. McKay et al., 115 F. Supp. 402. On appeal, the court of appeals for the District of Columbia held that the complaining power companies did not have the requisite litigable interest entitling them to sue, vacated the judgment of the district court, and remanded the case to the district court with instructions to dismiss the power companies' complaint. (CA DC 1955, 8 PUR 3d 414) 225 F. 2d 924; certiorari denied (1955) 350 US 884.

To construe the language otherwise defeats the obvious purpose of the statute and would nullify, in most instances, the authority delegated by the Congress. . .[17]

The power companies continue to contend, however, that, at least in certain circumstances, G and T loans are illegal because they are for the benefit of persons already getting central station service, even though from REA financed facilities. G and T loans are, of course, only one kind of loan to provide for the continuing and increasing needs of act beneficiaries.

System improvement loans for heavying up lines and increasing facility capacity are another. These, however, are not challenged.

Likewise, G and T loans have been made in which power companies have actually participated in utilizing the REA financed facilities through operating and leasing agreements and power pooling arrangements with REA borrowers. Such G and T loans have similarly not been challenged. In this way, a distinction is apparently drawn between system improvement loans and certain kinds of G and T loans on the one hand and other G and T loans on the other hand. Such a distinction again points up the basic position of REA critics that the G and T lending authority may not be exercised where the power company interposes the availability of its own wholesale power. While this distinction may be comprehensible from the point of view of the power company's economic interests, it plainly has no legal validity.

This year, attempts again have been made to impose public hearings upon the exercise of the Administrator's power to make G and T loans. This is a repetition of

17. 115 F. Supp., at pp. 410, 412.

previous efforts. The first such attempt was made in Congress in 1939.[18] Other such proposals were made in 1946, 1947 and 1950.[19]

The United States Supreme Court has held that the power companies have no legal standing or litigable interest to inject themselves into the federal loan-making process by challenging the validity of loans.[20] Having failed in the courts to get status to interfere in the loan-making process, they now try to achieve it through exploiting REA's alleged "secrecy" in keeping from power companies the details of G and T applications and supporting engineering studies prepared by the co-operatives.

Quasi-legal Argument

The second major aspect of the power companies' claim of the right of first refusal relates to co-operative service to nonfarm loads. Power companies keep repeating the statistics of the increasing percentage of the co-operatives' nonfarm service as somehow another indication of REA deviation. It really is merely a natural and desirable utilization of co-operative service to meet the changing character and needs of rural areas.

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18. HR 6292, 76th Congress, 1st Session (84 *Congressional Record* 5480).

19. Two proposals were made in 1946; the first is described in note 15 above, and the second 1946 proposal was contained in HR 5555, 79th Congress, 2d Session. The 1947 proposal is in HR 2709 (80th Congress, 1st Session); the 1950 proposal is in HR 6782 (81st Congress, 2d Session).

20. Alabama Power Co. v. Ickes (1938) 302 US 464, 21 PUR NS 289. This case was followed by the court of appeals for the District of Columbia in the Kansas City case, supra, note 16, in deciding that the complaining power companies had no legal standing or litigable interest to challenge the validity of a series of REA generating and transmission loans.

The desire of power companies to build into areas already served by the co-operatives to reach the more lucrative nonfarm loads has led them to develop a quasi-legal argument that co-operatives and REA were somehow intended to be limited to farm loads—perhaps not quite limited to farm loads, however. Those nonfarm loads served by co-operatives through facilities financed by REA that were sufficiently unattractive economically have not been challenged by the power companies.

The attempt to limit REA financing to only the poor loads not desired by commercial suppliers flies in the face of the plain language of the Rural Electrification Act. Why is service to a small country store or a small country hotel proper under the act and service to a rural industry improper? The rural industry may well be more important for the well-being and economic survival of the rural area, and the co-operative, too.

Here, again, one looks in vain in the statute itself for any basis for this power company distinction. The statute clearly does not limit its benefits to farmers. It confers its benefits upon "persons," and "persons" are defined in the broadest possible terms to include not only natural persons but corporations.[21] If anything more were needed, there is the clear statement in the statute itself that rural area includes "both the farm and nonfarm population."[22]

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21. Section 13 of the Rural Electrification Act (7 USC 913) provides that as used in the act "the term 'person' shall be deemed to mean any natural person, firm, corporation, or association."

22. Section 13, supra, note 21, provides that as used in the Rural Electrification Act, "the term 'rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and *such term shall be deemed to include both the farm and nonfarm population thereof.*" (Emphasis added)

It does not say only the poorer loads of the nonfarm population. It says nonfarm population without any qualification whatsoever. Here again, what criticism seems to come down to is the basic theme that the co-operatives may not in the broadest sense of the word compete with power companies, although power companies may compete in the most ruthless fashion with the co-operatives.

We are again confronted by the bare doctrine that the co-operatives may not serve what the power companies desire to serve. This doctrine would deny existing co-operative consumers the usual advantages of area development and diversity, doom them to higher rates, and pave the way for the eventual destruction of the co-operative in the electric field.

Another aspect of the attempt to deny co-operatives the right to serve the better nonfarm loads has to do with § 5 loans. The fact is that there is nothing new about such loans for electrical machinery. What is new is simply the greater current need for such loans. There is no new legal principle involved or any new application of any principle. Section 5 of the act authorizes loans not only for electric appliances but also specifically for electric equipment.[23] Many legal precedents, none of them new, clearly recognize that the concept of equipment is very broad and encompasses machinery.[24] Section 5 relates to

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23. Section 5 (7 USC 905) authorizes loans "for the purpose of financing the wiring of the premises of persons in rural areas and the acquisition and installation of electrical and plumbing appliances and equipment."

24. The following cases are illustrative: Landau v. Sykes, 54 So. 3, 4 (Miss. Sup. Ct. 1911); Linde Air Products Co. v. American Surety Co., 152 So. 292, 293 (Miss. Sup. Ct. 1934); Cement, Sand & Gravel Co. v. Agricultural Ins. Co., 30 NW 2d 341, 347 (Minn. Sup. Ct. 1947); Edkins v. Board of Education, 26 NY Supp. 2d 996, 997 (NY Sup. Ct. App. Div. 1941); Maryland Casualty Co. v. Davis Trust Co., 294 F. 573 (D. Ct. ND W. Va.

"rural areas" which, it is worth repeating, the act specifically says includes both the farm and nonfarm population.[25]

Charge of EEI

The third of the areas in which it is claimed REA has deviated from its original purpose is in service to communities of over 1,500 population. This concession is made in "The Deviation of REA": "In most of these cases the co-operative is blameless."[26] Perhaps, an even better way of saying it is that in most of these cases the co-operative deserves credit for the development in its service area, which has either caused it to grow beyond 1,500 or has attracted the expansion of municipal boundaries into the co-operative's service area. The Edison Electric Institute says it is against the will of Congress that the co-operative, though blameless, be allowed to continue to have the benefits of REA financing in these areas.

The official position of the Department of Agriculture has viewed altogether differently the will of Congress and the proper interpretation of the act. In 1959, REA conducted a survey to ascertain the extent and the circumstances of co-operative service in towns of over 1,500. As a result of that survey, the Director of Agricultural Credit of the department wrote to the chairman of the Senate Appropriations Committee who had inquired into the matter.[27]

1923); Equitable Trust Co. v. U. S. Oil & Refining Co., 35 F. 2d 508, 512 (D. Ct. Wyo. 1928); Duly Bros. Shoe Co. v. H. Jacob & Sons, 49 F. Supp. 118, 120, 121 (D. Ct. MD Pa. 1943).

25. See note 22, supra.

26. "The Deviation of REA," p. 38.

27. Supplement to Hearings before Subcommittee, Senate Appropriations Committee on Agricultural Appropriations Bill, 1960 (HR 7175), 86th Congress, 1st Session (1959).

His letter classifies the cases of such service into four categories. One is the result of population growth. The second is the result of the expansion of municipal boundaries to include portions of co-operatives' service areas. A third arises through REA financed acquisition of existing systems in towns of over 1,500 as an incidental and necessary means of providing service to unserved persons in rural areas. Such acquisitions of towns of over 1,500 were specifically upheld by the Comptroller General as far back as 1942.[28] The fourth category arises from the use of general funds by particular co-operatives, rather than REA funds.

Some electric suppliers would like to utilize municipal annexations and population growth to deprive co-operatives of the best parts of their service areas. Instead of the co-operative being allowed to realize some of the fruits of its pioneering, these other suppliers would penalize the co-operatives for successful pioneering.

They would want the co-operative's overall operations continuously weakened by successive dismemberments.

In the 1959 Department of Agriculture letter, an altogether different interpretation of the Rural Electrification Act was reaffirmed:

> It is clear that so far as the act is concerned, such a borrower may continue to provide service and REA may continue to make loans for system improvements or connections to the system since the character of the area for purposes of the rural area definition is determined as of a time the initial loan for a system is made.[29]

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28. Letter from the Comptroller General to Representative Lyle H. Boren, dated December 1, 1942 (B-29463).

29. Supplement to Hearings, cited note 27 above, at page 5.

Any other interpretation of the act would be grossly unfair and impractical and would be another step toward the realization of the fear expressed by Senator Norris in 1936. He proclaimed the need to protect the co-operatives "from being gobbled up by the private power companies."[30] To deprive a co-operative of the full use of its facilities—and the act's beneficiaries of continued REA financing—because of a technical population change, is to support and encourage piecemeal gobbling up of co-operative systems.

Purpose of Act

From a legal and historical point of view there is little doubt about who is doing the deviating. The act was clearly intended to prevent cream-skimming. The power companies claim the choice of all the cream. The act was clearly intended to provide for area coverage, including the good and the poor loads. The power companies would limit the co-operatives to just the poor loads. The act, by authorizing loans for the financing of generation and transmission facilities and not merely distribution facilities, was designed to afford the opportunity for effective rate negotiation and, where advantageous, independent power supply sources. The power companies would like to keep co-operative rural electrification dependent and weak.

There have been definitive rejections in Congress of the strange concept that a major purpose of the REA program is to insure power company cream-skimming in perpetuity. It is to be hoped that the time will come when the vital work of the consumer-owned co-operatives and REA in preserving the well-being of the rural areas of this country will be permitted to go forward, in full recognition of its solid and sound legal base.

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30. 80 *Congressional Record* 3307.

APPENDIX 3

OPINION NO. 4981

UNITED STATES DEPARTMENT OF AGRICULTURE

Office of the Solicitor

Washington 25, D. C.

May 26, 1944

Opinion for the Secretary

Dear Mr. Secretary:

You have submitted to me, for consideration of the legal issues involved therein, on REA loan docket, captioned Alabama 42GT1, 42A1 and 42GT2, Montgomery, descriptive of a proposal involving the making of an additional loan by REA in the amount of $2,805,600 to Alabama Electric Cooperative, Inc., an electric cooperative corporation organized under the laws of the State of Alabama. I have been advised subsequently that certain modifications were made in the proposal since the docket was originally submitted.[1] In this opinion, I have attempted to reflect the revised proposal.

The Administrator of the Rural Electrification Administration made a loan allotment[2] in the amount of $2,500,000 to this Cooperative on September 23, 1941, for the construction of a 12,500 KW generating plant and 381 miles of 44 KV transmission line primarily for the purpose of serving its REA-financed member distribution cooperatives in southern Alabama and in the extreme northwestern part of Florida. Such proposal did not contemplate the acquisition by the Cooperative of any existing facilities.

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1. Notably in a reduction in the estimated cost of new construction and in an increase in the estimated cost of rehabilitation.

2. 6 F. R. 5098.

The present proposal constitutes a revised plan on a more elaborate scale. The additional loan, together with the $2,490,000 remaining unexpended by the Cooperative from the earlier loan,[3] would render available a total of $5,295,600 which would be authorized to be expended as follows:

Acquisition of certain properties of Alabama Water Service Company (herein called "AWSCo"), including 160 miles of 44 KV transmission lines with substations, 42 miles of 13.2 KV distribution lines, 96 miles of 2.3 and 6.9 KV distribution lines, distribution substations, 3 hydro plants and 3 diesel plants	$2,075,000
Rehabilitation of acquired facilities	411,600
Incidental expenses in connection with acquisition	13,000
Construction of a new 12,000 KW steam plant and new transmission facilities included in the original proposal and not duplicated by any transmission facilities proposed to be acquired	2,220,500
Construction of 619 miles of new distribution lines in rural areas	571,000
Contingencies	4,500

In addition to, and bearing upon the legal problems presented by, this docket there have also been submitted to me: (1) the docket covering the original proposal as approved by the Administrator in 1941; and (2) certain

3. The docket shows that $10,000 has been advanced to the Cooperative for preliminary engineering and legal expenses incurred in connection with the original survey. The balance remains under so-called "stop order" pending post war availability of materials and the preparation and approval of detailed plans and specifications.

files, documents and correspondence assembled in connection with the present proposal and a recent restudy thereof.[4]

On the occasion of a recent visit to St. Louis, I made further inquiry of the members of the REA staff who prepared the restudy reports, touching upon certain additional matters deemed to be of possible relevance to the legality of the proposal.

For the reasons which will appear herein, I am of the opinion that, in the event it is determined that the approval of this loan is desirable administratively, in furtherance of the objectives of the Rural Electrification Act, such action by way of approval would not constitute an abuse of lawful administrative discretion and, therefore, would be legally supportable.

In an opinion, dated November 24, 1942, to the Administrator of Rural Electrification Administration,[5] I attempted to outline in one comprehensive opinion the general legal principles governing the power of the Rural Electrification Administration to finance the acquisition of existing electric facilities—principles theretofore applied over a period of more than five years in more than a hundred prior opinions by Mr. Vincent D. Nicholson, first as General Counsel of REA and subsequently as the Associate Solicitor of the Department having special responsibility for REA legal matters. In the light of a recent public criticism of this

4. This material included the reports prepared by various members of the REA staff in connection with the restudy of the properties made pursuant to the direction contained in your memorandum of February 26, 1944 to Mr. K. Wilde Blackburn of my office who was detailed to you, at your request, for the purpose of aiding you in your consideration of this docket.

5. Op. Sol. 4506. See also, Op. So. 4962, dated April 27, 1944, with particular reference to stock purchase transactions.

opinion, I have reviewed the legal questions involved and am convinced now, as I was at the time of its issuance, that the legal principles expressed in that opinion are sound. As I said there:[6]

> "Where the Administrator can best carry out the purpose of the Rural Electrification Act (bring electric energy to persons in rural areas not receiving central station service), through the medium of financing the erection of certain lines and the acquisition of other lines, this method of procedure is authorized. To rule otherwise would render the powers of the Administrator ineffective in many areas of the country and hamper the legislative intent with respect to this broadly conceived program under the General Welfare clause of the Constitution."

That opinion, however, did not purport to prescribe tests which would be self-operating and, as such, decisive of each of the wide variety of factual situations which might arise. In fact, the opinion, in the following language, expressly disclaimed any such intention:[7]

> "The question then boils down to a factual examination in each case as to whether the primary purpose of the loan, reasonably conceived, is to bring electric energy to persons in rural areas not receiving central station service. The initial decision on this problem is administrative, subject to the legal limitation that the Administrator's discretion may not be abused. At what point abuse sets in is a matter of degree and each case must be examined on its own facts."

In view of the very considerable amount of generation and transmission facilities in the present acquisition loan proposal in proportion to the amount of distribution facilities proposed to be acquired, it may be helpful if I discuss

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6. Ibid., p. 15304.
7. Ibid., p. 15304.

here, specifically as to the present proposal, some of the additional legal problems involved in a factual situation of this sort.

The legal validity of a loan to finance an acquisition involving generation, transmission and distribution facilities requires separate examination of the different kinds of facilities and their relation to the statutory purpose of rural electrification loans as outlined in the Act. This relationship may be different in respect of different kinds of facilities but the essential statutory purpose must necessarily be the same.

(a) *Distribution Facilities*

Turning then to the distribution properties included in the proposal, it is found that, of the proposed purchase price of $2,075,000, $371,000 is allocated to the purchase of 138 miles of 2.5 KV, 6.9 KV, and 13.2 KV distribution lines serving 2,177 consumers located largely in 18 towns, including the towns of Brundidge and Samson with populations of 1,909 and 2,182, respectively, and in 16 towns of less than 1,500 population (ranging in size from Milo with a population of 50 to Brently with a population of 1,126). There are 249 electric consumers in Brundidge and 252 electric consumers in Samson.[8] The allotment recommendation of Mr. Arthur W. Gerth, Chief of the REA Applications and Loans Division, dated January 4, 1944, and addressed to the Administrator, has the following to say with respect to the effect of the proposed acquisition.[9]

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8. Mr. W. Lyle Sturtevant's memorandum of December 31, 1943 to Mr. Arthur W. Gerth, at page 3, and Mr. James Salisbury, Jr.'s memorandum of December 31, 1943 (contained in the docket), at page 3.

9. At pages 1, 2.

"The acquisition of the above properties will enable the cooperatives to construct 631 miles or rural distribution line to serve 2,238 consumers *who otherwise could not be feasibly served.*" (Italics supplied)

Mr. Gerth's statements are supported by additional statements in the loan docket, in the restudy reports, and by data obtained at my St. Louis conference.[10] Revision of the proposal by the REA staff, since the original docket was submitted to me, in order to make "thinner" areas than were originally contemplated, has resulted in some modification of these figures. As revised the proposal is to construct 123 extensions and 78 secondary service drops—aggregating 619 miles to serve 1,614 new consumers in rural areas—persons whom it would not be feasible to serve unless the acquisition is made.[11]

From the proposal as thus stated, it seems apparent that the financing of the acquisition of the distribution lines, if standing alone, would be justified by these very beneficial and results.

Even apart from any broader implications of the acquisition proposal or the consideration of any of the more subtle factors which may in certain cases establish the legal validity of the proposal, it would appear that the mileage and dollar expenditures involved with respect to the proposed new lines are considerably in excess of the corre-

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10. Mr. W. Lyle Sturtevant's memorandum of December 31, 1943 to Mr. Arthur W. Gerth, at page 6; Mr. W. Lyle Sturtevant's memorandum of November 5, 1943 to Mr. L. L. Bean, Jr., at pages 5, 11 and 12; Mr. James Salisbury, Jr.'s report contained in the docket, at page 1; Mr. Gerth's memorandum of March 18, 1944 to you, at pages 3, 4 and 5; and Mr. Sturtevant's memorandum of March 20, 1944 to you, at page 13.

11. The restudy of this question was, I understand, made by or under the supervision of Mr. W. Lyle Sturtevant subsequent to the dates of the restudy reports referred to above.

sponding figures with respect to the distribution properties being acquired and the number of unserved persons—service to whom is necessarily dependent upon the acquisition—is significantly large. Further, it would appear that unless the acquisition is made none of the proposed new construction would be feasible. Under such circumstances the fact that two of the towns now served by the lines to be acquired are each slightly in excess of 1,500 population would not adversely affect the legal validity of the acquisition proposal.[12] This is especially true when we consider that the aggregate number of electric consumers in these two towns amounts to less than one-fourth (1/4) of the acquired consumers.[13]

(b) *Generation and Transmission Facilities*

As stated above, the relationship of generating and transmission facilities to the accomplishment of the essential statutory purpose may involve different considerations than is true with respect to distribution facilities. This difference becomes all the more important when, as in this case, generating and transmission facilities constitute such a large proportion of the loan. In the following portion of this opinion I shall discuss the considerations which are especially applicable to these facilities. The statutory authority for REA loans with respect to generation and transmission facilities (like that in respect of distribution facilities) stems from that portion of Section 4 of the Rural Electrification Act which authorizes and empowers the Administrator

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12. Op. Sol. 4506, at page 15308.

13. Supra, footnote 8. Total acquired consumers, 2,177. Total electric consumers in Brundidge and Samson, 501.

> "to make loans . . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service. . . ."

This language is clear and unambiguous. From the explicit use of the terms "generating plants", "transmission lines", and "systems", it is obvious that the Administrator may make loans not merely for the construction of distribution lines of relatively low voltage but also other elements of a self-contained electric system—namely, (1) an adequate and economical source of power (i.e., a generating plant), and (2) the means of transmitting power from such source to the lower voltage distribution lines (i.e., a transmission system adequate for that purpose). It is apparent also, from the words "construction and operation of generating plants . . . for the furnishing of electric energy to persons in rural areas . . .", that it is not legally essential that such a generating plant itself be located within a "rural area" as defined in section 13 of the Act. Had the opposite been the intent, it would appear that the Congress would have said "for the construction, in rural areas, of generating plants . . ." etc. It did not choose to do so and it would be improper for us to attach such a limitation contrary to a legislative intent so clearly thus expressed. It is an essential inference from the language of the Act, however, that the purpose of any generating plant so financed must be to furnish "electric energy to persons in rural areas who are not receiving central station service."

Two other relevant observations may be made on the basis of a careful analysis of this language of section 4:

1. The Act prescribes no fixed chronological sequence for the construction of the various parts of a borrower's system—that is, it does not require that the generating plant, transmission lines, and distribu-

tion lines all be constructed, or the financing of all of these parts be provided for, simultaneously. This is highly significant. The reason is clear and bespeaks sound judgment and full recognition on the part of Congress with respect to the essential problem involved. Rarely, if ever, does it occur that a cooperative with 500 miles of distribution line springs into being and operation complete in a single stage. Rather, the typical situation is for a cooperative to establish the feasibility of, receive a loan for, and construct a first section of its ultimate project consisting of, say 100 or 200 miles of distribution line. While this process is going on a new section is developed in an adjacent unserved area and the process is repeated as to such additional section. A cooperative may envision an eventual development of 500, 800, 1000, or even more miles of line to serve theretofore unserved persons in rural areas. If it proceeded to borrow funds for and construct the generation and transmission units for a system of this size prior to the relatively full development of the distribution portion of its program, with a resulting relatively exact knowledge with respect to the location of its distribution lines, the practical difficulties of such a course of action would be evident. In planning its generating plant under such circumstances it would, of necessity, have to make provision for future expansion of its load. Hence the size of the generating plant would be in excess of that required during the developmental stages of its operation. Thus unnecessary operating expenses would, as a result, be incurred during a considerable period. Moreover, the most economical location for the proposed plant cannot be ascertained and thus utilized until the Cooperative has a fair idea of the eventual location of most of its proposed distribution lines. Such knowledge enables the Cooperative to build its generating plant at approximately the center of its load. Such cooperatives normally, therefore, during the early developmental stages of

their operations, contract for supplies of wholesale power from the nearest available sources and then replace these sources of power with its own generating plants at a later stage in the development of their systems.

2. The Act does not require that a loan for the construction of a generating plant to furnish electric service to unserved persons in rural areas to be made to the same borrower who obtains the loan for the construction of the distribution lines necessary to serve the same such persons. Rather, in order to accord full meaning to all the language in the applicable part of section 4, we must construe such language as specifying four separate and distinct types of permissible loans: (1) loans for the construction of generating plants; (2) loans for the construction of transmission lines; (3) loans for the construction of distribution lines; and (4) loans for the construction of "systems" (i.e., consisting of any combination of the specified elements; distribution lines, transmission lines, and the requisite generating capacity). A loan of any one of these four types, however, can be made only for the purpose of "furnishing of electric energy to persons in rural areas who are not receiving central station service."

One practical application of this principle arises in the situation where several borrowers in the same general area have constructed distribution systems and, simultaneously, seek to complete their respective systems by adding an independent source of power and necessary transmission facilities to enable them to utilize such source. Under the principles stated above, it is legally permissible for REA to make a loan to each of these cooperatives to construct its own generating plant. In many cases, however, this is, from the economic viewpoint, the least desirable method of achieving a desirable and legitimate result. One larger plant, centrally located with respect to the several distribution systems,

can, frequently, generate the required amount of power much more cheaply and with less investment on the part of the Government than would be involved where a separate plant is to be constructed for each cooperative. In this way, also, economies, resulting from taking advantage of diversities in loads, are effected. In such cases, the usual procedure has been for the several REA financed distribution cooperatives to form a separate federated cooperative of which they constitute the members and, indirectly, the owners. The Government loan for the construction of generating and transmission facilities is *the* made to such federated cooperative, frequently referred to as a "generation and transmission" cooperative. Where the proposed loan is otherwise valid, such a procedure is legally permissible.

The statutory authority to make loans for the "construction" of generating plants and transmission lines does not restrict REA to the financing of the construction and assembling the various structures which go to make up a generating plant piecemeal and from entirely new materials. It sometimes happens, for example, that a used generating unit may be purchased and installed in the Cooperative's newly constructed plant and, when so installed, such second-hand unit will render satisfactory service for the Cooperative's purpose. Similarly, the loan may contemplate the purchase by the Cooperative of an existing building and the conversion of such building into a generating plant by the necessary repairs and installations. It may conceivably happen that the Cooperative, in lieu of constructing an entirely new plant, may desire to purchase an existing but unused generating plant in place. More frequently, the Cooperative's legitimate purpose may be achieved to the best advantage by acquiring, in place, an existing generating plant which is already serving some

consumers who must continue to be served but which has sufficient excess capacity to take care of all or part of the Cooperative's requirements also. Again, assuming that the proposed loans are, in other respects, proper and that the additional conditions specified at a later point in this opinion are satisfied, the word "construction", as used in Section 4 of the Act, is broad enough to render all of these varying procedures permissible.

The proper legal interpretation of the term "construction" was discussed in considerable detail in my opinion of November 24, 1942 and it is, therefore, deemed unnecessary to repeat that discussion here. Though in that opinion I was discussing the term in its relation primarily to the acquisition of distribution facilities, the authorities there cited are at least equally applicable here. Especially pertinent is the decision in *Ostrander* v. *Salmon*[14] where it was contended in argument against the validity of a proposed election relating to a bond issue that the arrangement proposed contemplated the purchase of water works already constructed. The statute in question authorized the city "to provide for the construction and maintenance of necessary water works. . . ." In discussing this issue the court stated:[15]

> "It is urged that the word 'construction' as used in this subdivision will not authorize a municipality to purchase works already constructed. We think it was not intended by the Legislature, by the language thus used, to prohibit a municipality from purchasing waterworks already constructed, and to make the same all or a part of a general water system for such municipality. The very fact that the municipality is authorized to provide for the construction and maintenance

14. 20 Idaho 153, 117 Pac. 692 (1911).

15. At page 693.

of necessary waterworks implies authority to purchase works already constructed, and to make the same all, or a part of, a general system of waterworks."

There is, however, one important distinction between the acquisition of distribution facilities and the acquisition of generation or transmission facilities. The former, since it serves the purpose of rendering possible the construction of new distribution facilities to serve unserved persons, must, of necessity, constitute only a portion of the distribution lines financed by the REA loan which is made for the purpose of such acquisition. The latter, however, stands on a different footing. The acquired generating facilities may, in certain cases, constitute the only generating facilities which the Cooperative will need or have for the accomplishment of its desired purpose. Any ratio between the output or dollar cost of the acquired generating facilities and those of the new generating facilities, if any, proposed to be constructed would, therefore, be without legal significance. It must of necessity be true, however, that any such loan for the acquisition of generating facilities have as its purpose the furnishing of electric energy to persons in rural areas who, prior to receiving service from the cooperative borrower (or its member distribution cooperatives, as the case may be) were not receiving central station electric service.

Generating plants acquired by a borrower, not primarily for the purpose of power supply but rather for the purpose of voltage regulation, stand on a somewhat broader legal base—being related more directly to the "operation . . . of systems for the furnishing of electric energy . . ." in addition to the legal justification therefor which is to be found in the explicit reference, in section 4, to "generating plants." Even here, however, the over-all system resulting from the borrower's program, of course, must be one for the

furnishing of electric energy to persons in rural areas who were unserved at the inception of the rural program involved.

The legal power of REA to finance the construction of a transmission (as distinguished from distribution) system either entirely new, or in whole or in part through the acquisition of existing transmission lines, rests upon the same legal basis as that with respect to generating plants and, generally speaking, the same considerations govern. There remains, therefore, the necessity of applying these general legal principles to the factual situation described in this Alabama docket as amplified by the restudy and additional inquiry which have been made. The generating facilities proposed to be acquired from the proceeds of the REA loan consist of three hydro plants (Elba, Gantt and Point A) and three diesel plants (Troy, Frisco City and Brundidge). The Frisco City and Brundidge plants are small, represent a relatively small allocated share of that portion of the total purchase price allocable to generating facilities, and, being located at or near the ends of the transmission system would be required for standby purposes.[16] The three hydro plants and the Troy diesel plant are the real producing plants with the Troy plant also being required for voltage regulation.[17] For reasons which will be clear hereinafter, it has been necessary for the AWSCo to supplement its generating capacity by purchasing additional power from Alabama Power Company.

On the basis of the provisions made in the proposed loan as outlined in the present proposal, it is estimated that, for the purpose of meeting load requirements of the ultimate system, 44,482,948 KWH of usable power will be

16. Mr. W. E. Herring's letter of March 21, 1944 to you, at page 1.

17. Ibid.

available *at the generating plants* from the operation of such plants. This estimate assumes average stream flow conditions at the hydro plants and the proposed installed capacity at all of the plants. This computation is as follows:

1942 generation by AWSCo plants plus purchased power	39,199,750	KWH[18]
Less: Purchased Power	6,320,000	KWH[19]
Generated Power	32,879,750	KWH
Additional hydro production available assuming average stream flow conditions and assuming rehabilitation for which provision is made in the docket	7,250,000	KWH[20]
Total generation from acquired plants on basis of docket	40,129,750	KWH
Additional hydro production obtainable by making changes at Gantt and Point A plants for which financial provision will be made under the present loan	4,353,750	KWH[21]
Estimated maximum output	44,482,948	KWH

The generating plant equivalent, in KWH, of the amount of power required for the present AWSCo load is stated in the docket to be 39,199,750 KWH.[22] If we deduct from this the KWH generating plant equivalent of the power now sold to two distribution cooperatives which are

18. Mr. J. Warner Pyles' memorandum of December 29, 1943 to Mr. Franklin P. Wood, Exhibit H.

19. Ibid.

20. Ibid.

21. Mr. J. Warner Pyles' Memorandum of March 23, 1944 to you, at pages 2, 3.

22. Supra, footnote 18.

members of the Cooperative (2,400,000 KWH),[23] the resulting figure reflecting the power requirements for the acquired system (including REA financed cooperative wholesale loads) is 36,799,750 KWH.

These figures would seem to indicate that there is a surplus of acquired generating plant output over acquired system requirements of 7,683,198 KWH[24] under the present proposal. Such conclusions, however, require some refinement, both as to power requirements and power availability, in order to reach a complete view of the situation.

In making the acquisition, the Cooperative is assuming the obligation of continuing service: (1) at wholesale to Towns of Troy, Luverne, and Evergreen which are now being served at wholesale by AWSCo; (2) at wholesale to the Towns of Andalusia, Elba, and Opp, which would acquire their respective distribution systems from AWSCo in the proposed acquisition transaction; (3) to eight large industrial consumers; and (4) to the remaining 2,177 present consumers of AWSCo which would be acquired by the Cooperative. The Cooperative would be *legally* obligated to continue service to all of these consumers at least for the duration of existing contracts. Even apart from any question of legal obligation, however, the present proposal contemplates continued service to all of these consumers and the docket so provides.

The above estimate of surplus of acquired power production over acquired system requirements (7,683,750 KWH) makes no allowance for normal growth in the power requirements of the acquired consumers[25]—load

23. Ibid.

24. 44,482,948 KWH – 36,799,750 KWH = 7,683,198 KWH.

25. Mr. Arthur W. Gerth's letter of March 16, 1944 to you, at page 5.

growth which the Cooperative expects to provide for as a part of its undertaking in making the proposed acquisition.

Though it is a fact of little significance in any consideration of the legality of the present proposal (which contemplates the construction and operation of a 12,000 KW steam plant—consisting of 3-4000 KW units—it should, perhaps, be noted here that there is relatively little firm power available from the hydro plants. At Point A,

> ". . . there is no firm power since the plant is completely out of service 1% of each year due to flood water. For 17% of the time each year, the plant capacity is curtailed due to high water."[26]

> ". . . The plant is completely shut down 2% of the time each year due to flood waters. For 16% of the time each year, the plant capacity is curtailed due to high water. . . . The plant has no firm capacity. . . ."[27]

It is of some significance, however, that operation of these hydro plants in connection with the proposed new steam plant would result in more effective use of such hydro facilities.

The estimates with respect to amount of power output of the acquired plants in excess of acquired system requirements have not overlooked the fact that to produce the amounts of usable power estimated, operation of the proposed steam plant or continuance of some form of power purchase arrangement will be necessary. The amount of power purchased by AWSCo from Alabama Power Com-

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26. Mr. J. Warner Pyles' memorandum of July 13, 1943 to Files, at page 3.

27. Ibid., at page 5.

pany is stated in the docket to be 6,320,000 KWH.[28] This presumably is the 1942 figure. The amount thus purchased in 1943 was 7,947,000 KWH.[29]

The 1943 power purchases by the Cooperative's ten member distribution cooperatives aggregated 11,253,408 KWH.[30] The generating plant equivalent of the quantity of power required to take care of the Cooperative's own requirements in 1949 for REA financed lines is stated in the docket as 36,070,000 KWH.[31] The equivalent of this ultimately required quantity, delivered to substations, is stated as 30,975,000 KWH.[32] The restudy indicates that these estimates are conservative.[33] It is recognized in the docket and in the restudy that even though all surplus of acquired generating plant output capable of being developed were firm power such surplus could not, alone, meet the power needs of the Cooperative. The acquired plants offer merely a partial solution and the construction of the proposed steam plant or the obtaining of a source of purchased power is an essential part of the pending proposal. As previously pointed out, however, REA financing of: (1) the acquisition of part of the required facilities; and (2) the construction

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28. Supra, footnote 18.

29. See schedule attached to Mr. William Matthew's letter of March 8, 1944 to Mr. K. Wilde Blackburn.

30. Mr. Richard Dell's letter of March 18, 1944 to you, at page 4.

31. Supra, footnote 18.

32. Supra, footnote 18.

33. Letters from the following, to you, bearing dates as indicated:

Mr. Arthur W. Gerth, March 18, 1944
Mr. W. Lyle Sturtevant, March 20, 1944
Mr. Richard Dell, March 18, 1944
Mr. J. R. Cobb, March 25, 1944

of a new plant to complete the system, is legally permissible.[34]

The transmission facilities proposed to be acquired serve, of course, two purposes—one complementary to the generating facilities under the ultimate plan and the other, complementary to the distribution facilities (also under the ultimate plan). Any legal determination with respect to the propriety of acquiring such properties in the present case, therefore, is to a very considerable extent dependent upon the legal decision with respect to the generating and distribution facilities. Such transmission facilities are an important and essential part of an electric system. Assuming that a loan for the remainder of the proposed system is legally valid and administratively approved, then, determined by the same factors of relevance, a loan for the acquisition of the transmission is legally permissible. Such factors of relevance must be applied to the total proposal rather than to the transmission facilities separately—this because of the dual purpose served by such facilities.

It appears, therefore, that: (1) Alabama Electric Cooperative, Inc. is a proper borrower for an REA loan of this type; (2) the end result desired to be accomplished by the loan (provision for a source of power for REA financed new construction in rural areas) is legally valid under the Rural Electrification Act; and (3) the acquisition need not be of facilities sufficiently large to accomplish this end result, but may, if desired, be merely a partial accomplishment of such desired result. On the basis of all of the facts available to me, therefore, there remains for discussion only whether the means proposed to be used in accomplishing this partial solution overshadow the legitimate objective sought.

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34. Supra, page 9.

From the foregoing discussion it is clear that the Cooperative, by the proposed transaction, would acquire a very substantial quantity of usable generating plant output which would be available for its purpose—a purpose proper for a loan by REA under Section 4 of the Rural Electrification Act. The benefits of the proposed transaction to the Cooperative, however, do not end there. REA engineers point out that the original loan proposal captioned Alabama 42GT1 Montgomery, as allotted in 1941, is, due to changed conditions, believed no longer to be feasible and the propriety of REA's continuing to advance funds for its consummation when the necessary materials again become available is, therefore, open to considerable question.[35] Only by a drastic revision in such original proposal can a loan to afford to these ten REA financed member distribution cooperatives a feasible and independent source of power be approved under the standards prescribed in the Act.

The same engineers—familiar with the original proposal and all of the other various proposals to this end which have been made by or on behalf of the distribution cooperatives and the Cooperative by the REA staff or by independent engineers—point out, further, that not only does the present plan offer a better and more feasible plan for such independent and feasible power source than did the 1941 proposal but that the present proposal offers the best and most feasible proposal on the basis of all studies of the problem which have been made.[36]

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35. See Memorandum of my conference at St. Louis, on May 12, 1944, with Messrs. Cobb, Pyles and Herring (among others).

36. Ibid.

The reasons for this conclusion on their part are not difficult to find. It is relatively easy to understand that integrated operation, under a single management and ownership, of an electric system approaching optimum size for the particular area offers—both from the economic and engineering viewpoints—obvious advantages over various alternative proposals which would contemplate the superimposing of a new generation and transmission system (wholly by new construction) upon an area in which a similar, suitable, and available system already exists. Acquisition of the existing system with its established business and operating surplus as a basis for the proposed cooperative system could early render feasible—or more feasible—a cooperative generating and transmission proposal, the financial soundness of which would be precarious indeed without such acquisition. The operating advantages of an arrangement such as the present one cannot be overlooked. The construction of the new steam plant will enable the Cooperative to make a more effective use of the hydro plants. Advantages will be gained through diversification of loads. Better voltage regulation and continuity of service seem possible than under a proposal which would involve merely the construction of a new steam plant (without the proposed acquisition).

The factors mentioned and other related factors which are important in formulating the administrative determination by way of approval or disapproval of the present loan proposal tend to elude precise measurement by anything akin to a "legal slide rule". Such precision of legal measurement is not the test of the legality or illegality of this type of loan proposal under the Rural Electrification Act.

As the Comptroller General stated in his letter of March 12, 1943 to Congressman Tarver:

". . . it would appear to be clear that when the power delegated by the Congress to the Administrator of the Rural Electrification Administration to make loans of the type authorized by section 4 of the above-cited act, 49 Stat. 1365 (7 U.S.C. 904) is viewed in the light of the controlling intent of the Congress to provide electric service to persons in rural areas not receiving central station service, there is a substantial basis for the inclusion in a loan authorized by the Administrator of an amount to cover the purchase of existing electric facilities in a case where the acquisition of such facilities and the incorporation thereof into a larger integrated system are merely the incidental means whereby the essential statutory purpose of providing electric service to unserved persons in rural areas is accomplished.

* * *

"Of course, the question as to whether the basic purpose of a proposed loan in a particular case is to provide electric service to unserved persons in rural areas is a matter for determination administratively, rather than by this office, after a thorough consideration of the pertinent facts and circumstances in the case. . . ."[37]

Here the Comptroller General is saying, in effect, that the determination as to whether, in a particular case, the proposed acquisition is a reasonable and proper *means* of attaining the legitimate *end* of extending electric service to unserved persons in rural areas, is an administrative (rather than a legal) one. From this it is not to be inferred, however, that the scope of such permissible administrative discretion is unlimited. As I pointed out in Op. Sol. 4506 (in language already quoted in this Opinion):

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37. Supra, footnote 5, page 3.

> ". . . The initial decision on this problem is administrative, subject to the legal limitation that the Administrator's discretion may not be abused. At what point abuse sets in is a matter of degree and each case must be examined on its own facts."[38]

Or, again:

> "Even though a given *means* is properly motivated and reasonably designed to achieve a legitimate *end* it may fall outside the scope of lawful discretion because it overshadows the objective."[39]

Under all of the facts of the present proposal as revealed in the docket, in the restudy reports, and from my subsequent inquiries, however, I am unable to say that approval of such loan proposal would involve any abuse of legitimate administrative discretion and am, therefore, of the opinion that such approval, if given, would be legally supportable.

Respectfully,

/s/ Robert H. Shields
Solicitor

Dictator
KWBlackburn: VPT
5-20-44

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38. No. B-32920, at page 4.
39. Ibid., at page 5.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. [redacted] 197

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners;

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION.
Respondent.

BRIEF OF RESPONDENTS: SINGING RIVER ELECTRIC POWER ASSOCIATION; PEARL RIVER VALLEY ELECTRIC POWER ASSOCIATION; DIXIE ELECTRIC POWER ASSOCIATION; SOUTHERN PINE ELECTRIC POWER ASSOCIATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

JOHN H. PRICE, JR.
HEDGEPETH, PRICE AND HEDGEPETH
Deposit Guaranty Bank Building
Jackson, Mississippi
Attorney for Respondents

Of Counsel:
JOHN K. KEYES
Collins, Mississippi

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1379

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,
Respondent.

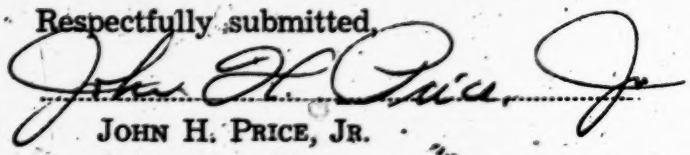
BRIEF OF RESPONDENTS: SINGING RIVER ELECTRIC POWER ASSOCIATION; PEARL RIVER VALLEY ELECTRIC POWER ASSOCIATION; DIXIE ELECTRIC POWER ASSOCIATION; SOUTHERN PINE ELECTRIC POWER ASSOCIATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Now come the respondents, Singing River Electric Power Association, Pearl River Valley Electric Power Association, Dixie Electric Power Association and Southern Pine Electric Power Association, and respectfully suggest unto the Court that they have carefully examined the brief filed or to be filed herein by the respondent South

Mississippi Electric Power Association. These respondents do hereby advise the Court that they concur in the aforesaid brief, and they respectfully suggest unto the Court that the matters contained in said brief are well taken.

These respondents hereby adopt the aforesaid brief of South Mississippi Electric Power Association, also a respondent herein, and request the Court that said brief be taken and considered as the brief of these respondents.

Respectfully submitted,



JOHN H. PRICE, JR.
HEDGEPETH, PRICE AND HEDGEPETH
Deposit Guaranty Bank Building
Jackson, Mississippi
Attorney for Respondents

Of Counsel:
JOHN K. KEYES
Collins, Mississippi

CERTIFICATE OF SERVICE

I, John H. Price, Jr., attorney of record for Singing River Electric Power Association, Pearl River Valley Electric Power Association, Dixie Electric Power Association and Southern Pine Electric Power Association, respondents in the above styled cause, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served a copy of the foregoing brief upon petitioners and other interested persons in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office, Jackson, Mississippi, with first class postage prepaid, properly addressed,

to each of the attorneys of record for petitioners and other interested persons, to-wit: James S. Eaton, Esquire, 2300 Fourteenth Street, Gulfport, Mississippi, and Thomas H. Watkins, Esquire, Plaza Building, Jackson, Mississippi, attorneys of record for Mississippi Power Company; Sherwood W. Wise, Esquire, Electric Building, Jackson, Mississippi, attorney of record for Mississippi Power & Light Company; T. Harvey Hedgepeth, Esquire, Deposit Guaranty Bank Building, Jackson, Mississippi, and David C. Welch, Esquire, The Gardiner Center Offices, Laurel, Mississippi, attorneys of record for the respondent South Mississippi Electric Power Association; and Bennett E. Smith, Esquire, Assistant Attorney General of the State of Mississippi, State Office Building, Jackson, Mississippi, attorney of record for Mississippi Public Service Commission.

This ~~June~~ July 1, 1966.

John H. Price, Jr.

JOHN H. PRICE, JR.